Case and Comment
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Baseball and the Law

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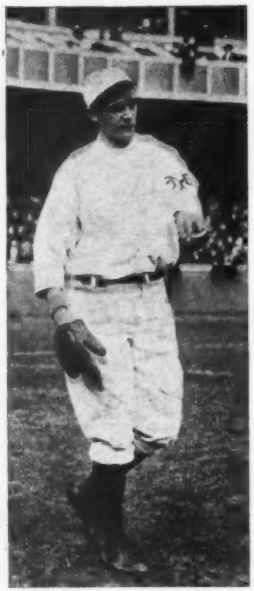
JUST catch this one from the epigrammatic bat of a friend of the writer, who can tell you about all of them right down the alphabet from Abbatichio to Zeider, no matter whether they flayed the ball during the reign of "King" Kell, ricochetted it contemporaneously with the "Bad Bill" Egan protectorate, or are dropping them over the infield since the ascension of "Ty" Cobb. The remark of the aforesaid friend, made during the recent strike of the Detroit players, was this: "When miners strike, and thus affect the price or supply of a luxury like coal, the public murmurs its disapprobation; but when an athletic team walks out and deprives the people of a necessity of life—like baseball, they just naturally rise up and howl." Now be it said in fairness that he said this not because he loves baseball less, but coal more. Being a good sportsman, he can enjoy a joke at the expense of baseball, or upon himself for that matter, as is shown by his assertion that the greatest game that he ever saw was one in which he, pitching for his college nine, struck out the first three batters who faced him, and the opponents nevertheless scored ten runs in the first inning. Simple enough, too, when the whole story is told. The substitute catcher played that day, and he was so short, he couldn't hold the "high, fast one," and each "third strike" rolled to the grand stand. To justify a reference to the foregoing under the title of this article, it is but necessary to note that this friend, besides being a baseball player, is a lawyer.

Baseball and the law. Very little research and reflection is necessary to show that these two subjects have much in common. Take, for instance, the definition of law in Black's Law Dictionary, as "that which is laid down, ordained, or established." Had the learned author been less specific, he might well be regarded as having attempted to describe a sacrifice hit, for is not the latter "laid down" by the batter, "ordained" by the manager, and "established" in the evolution of baseball strategy? "A rule or method according to which phenomena or actions coexist or follow each other," continues the author. Is baseball anything but that? Nor does Mr. Black stop here. His words, "A general rule of human action taking cognizance only of external acts," very succinctly characterize the attendance of baseball games. Certainly the statistics of attendance for a season disclose "a general rule of human action;" and it is thought that no one will seriously dispute that the average fan does not understand the intricacies of "inside baseball," but "takes cognizance only of external acts."

Then, too, the doctrine of *caveat emptor* does its deadliest work in respect of

the sale and exchange of players, as every manager and magnate has found out upon paying an exorbitant sum,—or, as the manager would say it,—"upon shoving across a bale of currency for a youngster who was touted as a comer who would be the one big noise around the circuit, only to find out that he couldn't hit a toy baloon with a snow shovel, and ran bases like he thought he was strolling down the center aisle to the strains of a wedding march." Further analogy between baseball and the law is found in a common difficulty of the umpire and the spectator, on the one hand, and the pleader, on the other. Why did "Silk" O'Loughlin invent his famous "strike tuh," and why does he or any other umpire jerk his thumb over his shoulder or hold out his hands horizontally like the fins of a walrus, accordingly as the runner is out or safe? Simply to avoid the effect of the principle of *idem sonans*. Did Connie Mack, alias Cornelius McGillicuddy, make any objection, when, during a game of the 1911 world-series between the Athletics and the Giants, "Larry" Doyle in sliding home failed to touch the plate, although he had the throw beaten "a mile?" Mr. Mack did not. Instead he dismissed the incident by invoking the maxim, "Equity regards that as done, which ought to have been done."



"RUBE" MARQUARD

The pitching marvel of the New York Giants. At this writing his season's record was nineteen games won and none lost.

There are, of course, certain legal practices and principles which have no place in baseball. The umpire never hands down an interlocutory judgment, and so far from setting aside a judgment, he never even grants a rehearing. It is true that a party is occasionally thrown out of court in case of a "misnomer," but this proceeding in baseball more closely resembles a contempt proceeding in law. At this point, as well as any other, ref-

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[1] See the following decisions: The owner of a pleasure resort who permits the playing of ball away from the portion of the ground devoted to such sports and near to that devoted to dancing, without notifying those interested in the dancing or taking precautions to protect them from injury, may be liable for an injury inflicted by ball which struck a spectator of the dancing. Blakeley v. White Star Line, 154 Mich. 635, 129 Am. St. Rep. 496, 118 N. W. 482, 19 L.R.A.(N.S.) 772.

The officers and directors of an agricultural association are not liable merely because of their office, for injuries to a patron of a fair injured through absence of a screen to shield spectators in a grand stand from foul balls from a baseball game allowed to be played on the grounds. Williams v. Dean, 134 Iowa, 215, 11 L.R.A.(N.S.) 410, 111 N. W. 931.

A base runner in an indoor game does not voluntarily expose himself to unnecessary danger, within the meaning of an accident insurance policy, by merely overrunning his base and relying on the wall of the building to stop him when he places his hands and feet against it. Hunt v. United States Acci. Asso. 146 Mich. 521, 117 Am. St. Rep. 655, 109 N. W. 1042, 10 Ann. Cas. 449, 7 L.R.A.(N.S.) 938.

See also State ex rel. Rowland v. Seattle Baseball Asso. 61 Wash. 79, 111 Pac. 1055, 31 L.R.A.(N.S.) 512, which makes three points: (1) Mandamus will not lie to reinstate a baseball club in a league from which it has been expelled, if, by the terms of the constitution, it could be immediately expelled again effectively. (2) A provision of the constitution of a baseball league, that the membership of any club may be terminated by a unanimous vote of the remaining club, is not affected by a subsequent resolution extending the franchise of clubs in the league for periods of five years, where it does not appear that the resolution was passed by a unanimous vote, as required by the constitution to amend it, and no reference to the constitutional provision is made in the resolution. (3) A baseball club cannot be expelled from a league at a special meeting called for a specified purpose, where no notice is given that the question of its expulsion will be considered at the meeting.

erence may be made to that famous episode, a comment upon which seems indispensable to every article touching upon baseball. This concerns that indecisive battle of the world in which Merkle, of the New York Giants, failed to go to second base after the batter made a hit. Amusing indeed would have been the spectacle if, instead of declaring Merkle out when "John Argus-eyed" Evers," as the New York Sun calls him, stepped upon second after receiving the throw-in, the umpire, had deprecatingly raised his hands and said: *"De minimis non curat lex."* Coming to the adjudications on matters pertaining to baseball, it is found that, with a few exceptions,[1] the decisions involve either the contract relation of club and player, or the application of the nuisance or Sunday laws to baseball. As early as 1882 a case involving the former matter came before the United States circuit court for the western district of Pennsylvania, wherein it was held that a baseball player who had signed an agreement to execute, between certain future dates, a formal contract to play baseball for a certain club during its season, could not, by a bill in equity, be compelled to execute the formal contract, or enjoined from contracting with or playing for another club.[2] In 1890, a similar case came up in the United States circuit court for the southern district of New York, which held that, since a contract giving baseball clubs the right to "reserve" their players for another season, simply accorded the clubs the right, as against other clubs subscribing to the national agreement, to secure the services of such players if the parties could agree, but placed no obligation upon the players to enter into a contract for such season,—the players could not be compelled to enter into such future contracts by a decree of specific performance, and consequently could not be enjoined from entering into contracts with other clubs.[3] And in a New York case arising the same year, it was held that since this "reserve" clause contained nothing to indicate what the conditions of the contract for the ensuing year would be, it was too indefinite to warrant equity in enforcing its specific performance by enjoining the player from contracting or playing with any other club. And it was also declared in the same case that, even supposing the contract for the ensuing year was to be upon the same terms and conditions involved in the contract containing the "reserve" clause, equity would not interfere, since the clause as so construed, when taken in connection with another provision of the contract giving the employer the right to terminate it upon ten days' notice, was so unfair and unmutual as not to merit the sanction of equity.[4] A still later case[5] holds that the provisions of the national agreement of 1903, and of the rules of the national commission thereby created, which gave a club the right to "reserve" such of its players as it desired for another season,

"CY" YOUNG

The Grand Old Man of Baseball. 22 years a major league pitcher.

[2] Alleghany Base Ball Club v. Bennett, 14 Fed. 257.

[3] Metropolitan Exhibition Co. v. Ewing, 7 L.R.A. 381, 42 Fed. 198.

[4] Metropolitan Exhibition Co. v. Ward, 24 Abb. N. C. 393, 9 N. Y. Supp. 779.

[5] Kelly v. Herrman, 155 Fed. 887. The court said that if Kelly's continued service with St. Paul, after the adoption of the national agreement, was a violation of that instrument, the violation was the club's, and not Kelly's.

or to sell them to another club, in the absence of any stipulation to the contrary in the contract between the parties,—, was held not binding on one Kelly, who went to the St. Paul club as a playing manager, and later became president and general manager under a special contract, where he never signed "player's contract," although he did remain with the St. Paul club until after the execution of the national agreement. It was therefore held that the St. Paul club had no right to sell his services to the St. Louis club without his consent, and that he was entitled to enjoin the placing of his name upon the black list for his refusal to serve the St. Louis club.

With respect to fines and suspensions, it has been held that language in a contract of employment which vests discretion in the manager to fine or suspend the player must be interpreted in a reasonable sense as affording the right to fine or suspend for delinquencies on the part of the player in the performance of his duties, or for disrespect or disobedience exhibited toward the employer in the course of the duties performed. Such was declared to be the law in a case which arose when "Monti" Cross, back in 1894, was fined and suspended for using "improper" and "reprehensible" language toward the manager of the Detroit club, and the court, although deprecating the use of the language by the player, held that he could not be suspended for giving the manager a piece of his mind in the course of a personal altercation which had nothing to do with the performance of the player's duties.[6] A usage or custom for baseball clubs to discharge a player on ten days' notice if he is deficient in playing cannot modify a special contract for a definite time,—especially when the player has no reciprocal right to cancel the contract.[7] And one who agrees to manage a team under a contract for a specified time, in which the club stipulates that it will not release the manager within the time specified, may recover his stipulated salary up to the time he was released at his own request, notwithstanding he was able to render only limited service because of illness.[8]

The ordinary skill, knowledge, and efficiency of baseball players is all that is required of the player under a contract of hiring for a definite time, which is silent to the degree of skill to be possessed.[9] And it has been held that the impossibility of obtaining equivalent service is not necessary to support an injunction against breach of a contract for exclusive services, it being sufficient that no certain pecuniary standard exists for the measurement of the damages. Such was declared to be the law in a Pennsylvania case,[10] holding that an injunction will issue to prevent a baseball player from violating his contract to serve a certain organization for a stipulated time, during which he is not to play for any other club, where he is an expert player, has been with the organization sufficiently long to have become thoroughly familiar with the team work, and is a most attractive drawing card for the public because of his great reputation for ability in the position which he fills; and holding further that—at least after the contract has been partly performed—lack of mutuality of remedy will not prevent the issuance of the injunction, merely because the options of renewal and of terminating the contract on ten days' notice rest only with the employer, where such options expressly form part of the consideration by which the compensation is paid. This case arose when "Nap" Lajoie attempted to break his contract with the Philadelphia club, and here is the court's opinion of this particular performer: "The court

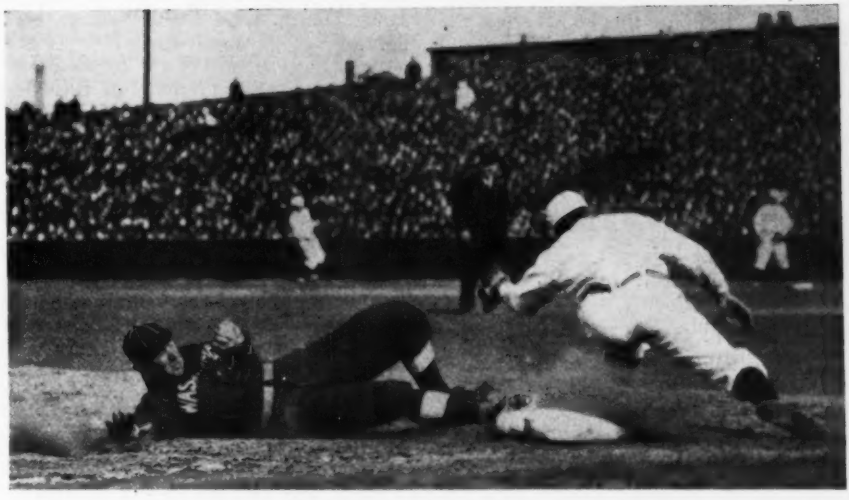
[6] Cross v. Detroit Base Ball Club, 84 Mo. App. 526.

[7] Baltimore Base Ball Club & E. Co. v. Pickett, 78 Md. 375, 44 Am. St. Rep. 304, 28 Atl. 279, 22 L.R.A. 690.

[8] Egan v. Winnipeg Base Ball Club, 96 Minn. 345, 104 N. W. 947. The court, in this case, pointed out that even if the club could have terminated the contract when the plaintiff became incapacitated by illness, notwithstanding the stipulation referred to, it made no attempt to do so, and therefore the contract remained binding until the plaintiff was released at his own request.

[9] Baltimore Base Ball Club & E. Co. v. Pickett, 78 Md. 375, 44 Am. St. Rep. 304, 28 Atl. 279, 22 L.R.A. 690.

[10] Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L.R.A. 227.



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PICKERING OF WASHINGTON SLIDING TO THIRD BASE

below finds from the testimony that 'the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game.' We think that in thus stating it, he puts it very mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. He has been for several years in the service of the plaintiff club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club, and his own work is peculiarly meritorious as an integral part of the team work, which is so essential. In addition to these features which render his services of peculiar and special value to the plaintiff, and not easily replaced, Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright, particular star." But the circuit court for the city of St. Louis takes issue with the Lajoie Case, and holds that an injunction will not issue in such circumstances to prevent a player from performing his contract to play for another club.[11] While the court intimates that there is some ground for distinction in that the services of the player involved were not as valuable as were those of Lajoie to the Philadelphia club, it expressly places its decision upon the ground that the contract was so lacking in mutuality that equity could not interfere by injunction, and also upon the ground that in view of the provisions of the Missouri Constitution, declaring that all persons have the natural right to life, liberty, and the enjoyment of the gains of their own industry, and prohibiting slavery or involuntary servitude except as a punishment for crime, a court had no power to enforce the performance of a contract for personal services. On the latter phase of the case, the court had this to say: "It is the wish and pleasure

[11] American Base Ball & Athletic Exhibition Co. v. Harper, 54 Cent. L. J. 449.

of the defendant to serve his present employer. In doing this he exercises the right of choosing his own associates and serving whom he sees fit, going at his own pleasure, following his chosen occupation, and enjoying the gains of his own industry. These are the natural rights of free men, and go to make up the 'liberty' which the constitutional provisions in question guarantee and protect. And it would seem that they are rights which cannot be bartered away by either contract or consent, because all provisions of agreements in contravention of law are void."

Ejusdem Generis.

In approaching the question whether the playing of baseball, either of itself, or taken in connection with the attendant circumstances, offends the laws against nuisances, and the desecration of the Sabbath, it may first be noted that through the doctrine of *ejusdem generis*, many a player has escaped punishment for participating in a Sunday game. Still, if you were to tell a player that *ejusdem generis* was one of his best friends, he would probably say: "I can't hit those fast ones over the inside corner; just pitch me a slow one." Nevertheless, in telling him this you would have the backing of the courts, for it has been judicially declared in effect that a baseball is in a class by itself. Just turn to the decisions, and they will tell you that while baseball playing is "sporting," [12] it is not a game, one of the games, or a game of any kind, but is THE game. For has it not been declared that baseball should not be mentioned in the same breath with horse racing, cock fighting, or playing at cards? [13] If not, what is the meaning of the following remarks of Judge Marshall, of the Missouri supreme court, following an introduction of Old Doctor *Ejusdem Generis?* "Baseball does not belong to the same class, kind, species, or genus as horse racing, cock fighting, or card playing. It is to America what cricket is to England. It is a sport or athletic exercise, and is commonly called a game, but it is not a gambling game nor productive of immorality. In a qualified sense it is affected by chance, but it is primarily and properly a game of science, of physical skill, of trained endurance, and of natural adaptability to athletic skill. It is a game of chance only to the same extent that chance or luck may enter into anything man may do. But when chance or luck is pitted against skill and science, it is as fair an illustration of what will result as any test that could be applied. If the view of the Williams Case had been adopted, this statute would have been elastic enough to cover every game that ever was or ever will be invented, no matter whether it was harmless, promotive of physical or mental development, or deleterious to both. It would prevent games of chess, backgammon, jacks, authors, proverbs, faro, keno, and poker alike." [14]

[12] Playing baseball comes within the definition of the word "sporting" in a statute prescribing penalties against persons who shall be found on Sunday sporting, rioting, hunting, fishing, or shooting, or engaged in common labor, works of necessity and charity only excepted. State v. O'Rourk, 35 Neb. 620, 53 N. W. 591, 9 Am. Crim. Rep. 689, 17 L.R.A. 830. It was contended in this case that if such was the effect of the statute, the restraint it imposed was in contravention of natural right or religion, and therefore, in excess of the powers of the legislature. The court, however, refuted this contention by an extensive and learned discussion of the benefits of Christianity and of Sunday observance, and the pernicious effects of its violation. This case was followed without discussion in Seay v. Shrader, 69 Neb. 245, 95 N. W. 690.

[13] The playing of baseball on Sunday is not prohibited by a statute which provides that "every person who shall be convicted of horse racing, cock fighting, or playing at cards or game of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding $50." State v. Prather, 79 Kan. 513, 131 Am. St. Rep. 339, 100 Pac. 57, 21 L.R.A.(N.S.) 23. It should also be remarked that in this case the court takes occasion to discuss the history of baseball, including the controversy as to whether it is only a modified form of the English game of "rounders," or whether it is distinctively American. Other cases reaching the same result are St. Louis Agri. & Mechanical Asso. v. Delano, 108 Mo. 217, 18 N. W. 1101; Ex parte Neet, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025.

[14] Ex parte Neet, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025. The Williams Case referred to in the above quotation is State v. Williams, 35 Mo. App. 541, which reached a contrary conclusion, and which the Neet Case declares overruled.

A city cannot arbitrarily limit or forbid the playing of baseball.[15] And naturally it is held that the playing of baseball is not a nuisance *per se*.[16] Nor does it become such merely because the players bat balls on to adjoining property and commit trespasses in reclaiming them.[17] But where, in addition to such trespasses, it is alleged, although it is also denied, that indecent language is used not only upon the premises, but by persons attracted to the vicinity, and that the occupation of the adjoining premises is rendered disagreeable, a preliminary injunction will be granted at the suit of the adjoining owner; but the decree should only restrain the use of the defendant's premises for the playing of baseball in such a manner as to create a nuisance which annoys the plaintiff.[18] And a baseball park which daily attracts disorderly and noisy people to whom the proprietors sell intoxicating liquor in violation of law is a public nuisance which may be enjoined by the owner of adjacent property, at least where such property is thereby rendered well-nigh uninhabitable and its rental value is lessened.[19] And of course, if a baseball game and its attendant circumstances violate a statute providing that if any persons to the number of thirty or more shall be unlawfully, riotously, or tumultuously assembled, it shall be the duty of the sheriff and his deputies to go among the persons so assembled, and in the name of the people of the state command such persons immediately and peaceably to disperse,—it is the sheriff's duty to prevent the game, and if the players persist in proceeding with it, he must promptly arrest them.[20] But this does not imply that the mere playing of a baseball game on Sunday constitutes necessarily such a breach of the peace as will render the statute applicable. It does not justify an arrest unless there are overt acts or other circumstances justifying a command to disperse, or, in other words, unless the assemblage becomes tumultuous or riotous, and there has been a disobedience of the command.[21] Of course, this is a severe test of self-control upon the part of the assemblage, but so long as the audience refrains from disturbing demonstrations, the game should be allowed to continue, for these decisions essentially hold that so long as the crowd refrains from shouting when the local shortstop heads off the runner at first after a hard pick up in deep short, or overcomes its desire to howl with delight when the left fielder backs up against the fence and catches a fly with one hand, or resists its inclination to throw pop bottles at the umpire because he calls a strike on the home favorite when the catcher had to dig the ball out of the dirt,—so long as the crowd refrains from doing these or similar acts, the game must be allowed to proceed.

Sunday Baseball.

However it is held that the possibility that Sunday baseball is illegal under the statute, and that it annoys the residents of the neighborhood near which it is

[15] Where the facts alleged show injury to property rights resulting from the enactment of an ordinance excluding the erection or operation of baseball parks within certain limits, and that the ordinance was personal, arbitrary, and discriminatory in its character, and the power of the city council to enact any such ordinance as a police regulation is questionable, a proper case is disclosed for the interference of a court of equity by the process of injunction. New Orleans Baseball & Amusement Co. v. New Orleans, 118 La. 228, 118 Am. St. Rep. 366, 42 So. 784, 10 Ann. Cas. 757, 7 L.R.A.(N.S.) 1014.

[16] Spiker v. Eikenberry, 135 Iowa, 79, 124 Am. St. Rep. 259, 110 N. W. 457, 14 Ann. Cas. 175, 11 L.R.A.(N.S.) 463; Alexander v. Tebeau, 24 Ky. L. Rep. 1305, 71 S. W. 427, subsequent appeal, 132 Ky. 487, 116 S. W. 356, 18 Ann. Cas. 1092; New Orleans Base Ball & Amusement Co. v. New Orleans, 118 La. 228, 118 Am. St. Rep. 366, 42 So. 784, 10 Ann. Cas. 757, 7 L.R.A.(N.S.) 1014; Young v. New York, N. H. & H. R. Co. 136 App. Div. 730, 121 N. Y. Supp. 517.

[17] Injunction will not lie to restrain the owner of vacant property from permitting it to be used as a playground, merely because persons using it bat balls on to adjoining property and commit trespasses in reclaiming them. Spiker v. Eikenberry, 135 Iowa 79, 124 Am. St. Rep. 259, 110 N. W. 457, 14 Ann. Cas. 175, 11 L.R.A.(N.S.) 463.

[18] Cronin v. Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605.

[19] Alexander v. Tebeau, 132 Ky. 487, 116 S. W. 356, 18 Ann. Cas. 1092.

[20] Scougale v. Sweet, 124 Mich. 311, 82 N. W. 1061.

[21] Yerkes v. Smith, 157 Mich. 557, 122 N. W. 223.

situated, and depreciates the value of their property for residential purposes, is sufficient to justify a refusal to dissolve a preliminary injunction enjoining a professional baseball association from conducting Sunday games for profit.[22] And the mere doubtfulness of the validity of Sunday baseball playing, irrespective of whether it is actually legal or illegal, is sufficient to warrant the vacation of an injunction *pendente lite* restraining police commissioners from entering the baseball grounds and arresting the players.[23] Nor will the police be restrained from preventing a baseball game upon the grounds of an athletic club where, although no nominal admission fee is charged, the games are advertised and every person desiring to attend is apparently required to purchase a score card as a prerequisite to admission.[24] But a landowner is not subject to prosecution as for a nuisance upon the ground that his premises are used for Sunday baseball playing, where it does not appear that he attended the game, or was aware of the assemblage of spectators, or that he induced people to play or witness the game, or derived any benefit therefrom.[25] And while the rule that the fact that a condition is such as to constitute a public nuisance does not preclude a private individual whose rights are thereby injuriously affected from seeking equitable relief against its continuance, applies to a baseball game and the conditions which attend it,[26] a municipal police commissioner cannot upon the relation of private persons, be compelled by mandamus to prohibit Sunday baseball in the city, where it appears neither that the grievance of the petitioners differs from that of other citizens, nor that the attorney general of the state has refused to take action in the matter, the grievance being purely a public one for which relief should be sought by the public agents.[27] One case goes so far as to declare in general terms that, irrespective of whether an admission fee is charged or not, a baseball game to which the public is invited is within the prohibition of the statute.[28] And in a New Jersey case a preliminary injunction was granted against the use of the premises of a professional ball club for Sunday games, where it was made to appear that it resulted in collecting large and boisterous crowds and in depreciating the value of property in the neighborhood.[29] But in a subsequent New Jersey case denying the right of a property owner to a preliminary injunction against the playing of professional baseball in an adjoining park, upon the ground that such use of the park, although rendering the occupancy of the plaintiff's premises uncomfortable, did not constitute such an irreparable injury as warranted the relief sought,—the court takes occasion to point out that in the earlier New Jersey case just referred to, it was assumed, rather than urged or decided, that the noise and disturbance arising from Sunday baseball games constituted an irreparable injury from an equitable point of view.[30]

In a generic sense, baseball assumes many forms; for example, "One old cat," "catch," or "knocking up fly balls." The difference between these and baseball in

[22] Dunham v. Binghamton & L. Baseball Asso. 44 Misc. 112, 89 N. Y. Supp. 762.

[23] Capital City Athletic Asso. v. Greenbush, 9 Misc. 189, 29 N. Y. Supp. 804.

[24] Ontario Field Club v. McAdoo, 56 Misc. 285, 107 N. Y. Supp. 295.

[25] People v. Monteverde, 43 Hun, 447.

[26] Cronin v. Bloemecke, 58 N. J. Eq. 313, 43 Atl. 605; Gilbough v. West Side Amusement Co. 64 N. J. Eq. 27, 53 Atl. 289.

[27] Sweet v. Smith, 153 Mich. 674, 117 N. W. 59.

[28] Paulding v. Lane, 55 Misc. 37, 104 N. Y. Supp. 1051. But it is to be observed that in this case an injunction was sought against a peace officer to prevent him from enforcing the statute, and that, as already shown in this article, the New York courts had already taken the position that the mere possibility of the illegality of the game was sufficient to warrant a refusal of relief of this kind.

[29] Seastream v. New Jersey Exhibition Co. 67 N. J. Eq. 178, 58 Atl. 532. And it was further held in this case that the right of the owners of neighboring property to the relief sought was not affected by the fact that, prior to the acquisition and use of the property for professional baseball playing, it had lain open as a common, and had been used on Sunday, without let or hindrance by the owners, for the playing of baseball by whomsoever chose to do so, and in the presence of whomsoever chose to look on, without having to pay for the privilege of so doing.

[30] McMillan v. Kuehnle, 78 N. J. Eq. 251, 78 Atl. 185.

the strict sense is well known and is judicially recognized. One court, in reaching the conclusion that "knocking up fly balls" in an open square in a village was not a nuisance, had this to say: "There is this difference between the game played and that of baseball. In this game the player attempts to strike the ball up into the air in the general direction of the players, who have no particular stations, so that one of the players may be able to catch it ere it falls to the ground. In baseball the batman aims to strike the ball within the side lines of defined territory whereon the players are stationed at certain points, but out of reach of his opponents and generally not up into the air, lest one of them may catch it ere it falls." [31] Any player will vertify and indorse the last statement. Just ask "Joe" Jackson or "Mike" Donlin about it, and he will say the same thing, namely, that he "has to be little bright eyes on the job every minute to cop the bill before it dents the turf." At any rate the foregoing quotation presents one application of the distinction observed in several cases between baseball the amusement, and baseball the exhibition. For, it is the entertainment of the public and the charging of a fee that imparts to the game the character of a public sport.[32]

In other words, it isn't baseball the game, but baseball the business, which is frowned upon so far as Sunday observance is concerned. The law frowns upon the fee, while the baseball magnate declares that the fee is the *sine qua non*. Of course the law prevails, and if the statute says that no game shall be played on Sunday where a fee is charged, the law is held to be violated by charging a small sum for seats in the grand stand and bleachers, although no admission fee, strictly speaking, is charged, and the persons who see the game without cost greatly outnumber those who purchase seats.[33] But it is held that baseball playing on Sunday in an open space is not of itself prohibited by the New York statute, except in cases in which there is a serious interruption of the repose of the community.[34] And since it appears that the provision of such statute is

[31] Young v. New York, N. H. & H. R. Co. 136 App. Div. 730, 121 N. Y. Supp. 517. This action was instituted by a person who was injured by being struck by the ball, against the owner of the open square, upon the theory that suffering the premises so to be used constituted a nuisance. But it was held that there was not sufficient evidence to go to the jury, the game not having been played in a densely settled part of the town, and it appearing that, during the many years the premises had been so used, no injuries had occurred except the breaking of two windows, although one person testified that once he "very near got hit."

[32] The charging of an admission fee for witnessing a Sunday baseball game attaches to it the character of a public sport, and subjects the participant to prosecution under a statute forbidding all shooting, sporting, horse racing, gaming, or other public sports upon the first day of the week. Cheeves v. State, 5 Okla. Crim. Rep. 361, 114 Pac. 1125.

[33] Heigert v. State, 37 Ind. App. 398, 75 N. E. 850.

So, too, the placing of a contribution box, although unaccompanied by any sign asking for contributions, at the entrance of a field apparently equipped to entertain a public audience, is such a silent invitation for contributions as shows that the game is being played for profit, and therefore places it within the inhibition of the statute, although actually the public is admitted without hindrance. People ex rel. Hart v. Demerest, 56 Misc. 287, 107 N. Y. Supp. 549.

In Southern Tier Baseball Asso. v. Day, 69 Misc. 53, 125 N. Y. Supp. 733, in which the Elmira club of the New York state league sought to enjoin the sheriff from preventing games between its team and that of another club in the league, and in which the defendant contended that the games were not publicly or privately advertised, that the public was not invited, that no admission fee was charged, and that within the grounds there was no disorder or any other act interrupting the peace and repose of the Sabbath or the religious liberty of the community,—it was held that the injunction should not issue, since the games could not be regarded as a recreation in any sense, as the players engaged in the game for hire and the club was maintained for profit. In other words, the court held that the playing of baseball upon Sunday between league teams, whose members play for hire, is not the recreation of the individual which the law will not prevent.

[34] People ex rel. Bedell v. DeMott, 38 Misc. 171, 77 N. Y. Supp. 249, 16 N. Y. Crim. Rep. 551; People ex rel. Poole v. Hesterberg, 43 Misc. 510, 89 N. Y. Supp. 498. The statute involved provides as follows: "The law prohibits the doing on that day of certain acts hereafter specified which are serious interruptions of the repose and religious liberty of the community." The specified acts prohibited are "all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows upon the first

aimed at all noise disturbing the peace of the day, the word "playing" employed therein is not to be regarded as covering the acts of three persons in pitching a ball from one to the other, without noise, and upon private grounds, with the consent of the owner thereof.[35] And a Pennsylvania case holds that however reprehensible as a desecration of the Sabbath, the playing of a baseball game in an isolated place was not such a breach of the peace as to render the players indictable as for a common nuisance, where it did not appear that the peace and quiet of any person was thereby disturbed.[36]

A statute forbidding, under penalty, the playing of baseball on Sunday where any fee is charged, is not void for uncertainty and ambiguity because it does not describe what is meant by "fee" or does not indicate by whom it is to be paid; nor does it, because it imposes a penalty upon the players, violate the constitutional prohibition against class legislation upon the theory that baseball playing is an occupation which cannot be singled out by penal or prohibitive legislation; nor does it offend the constitutional right of citizens to equal privileges and immunities merely because it imposes a larger penalty on persons who play baseball on Sunday than is imposed upon those who violate Sunday statutes forbidding hunting, fishing, rioting, quarreling, and acts of common labor.[37] And a statute expressly forbidding the playing of baseball on Sunday has been held constitutional, upon the ground, not that Sunday is a holy day, but that the statute was within the police power of the legislature in relation to the public health, morals, and safety.[38] As has been said in this connection, "a law enacted for sufficient reasons of a secular nature, as the public health, cannot be held invalid because there is a variety of religious notions upon the subject. Nor can the statute be prevented from adopting certain civil regulations, recommended by a wide public policy, simply because found to be in accord with the teaching of some religion. There is probably no religious observance that could not be enforced as a secular duty, without violating the guaranty of religious liberty, where there are sufficient secular reasons for doing so, independent of what is ordained as a matter of religion. In general, where there are secular and religious reasons for the same observance or law, the observance or law may be adopted as a civil regulation by the legislature for the attainment of the secular purposes; and, when enforced for these purposes alone, no one can complain of it simply because the observance or law finds support in the precepts of some religion." [39]

In a New York case, the court calls attention to the relaxation of the strict customs which obtained in those early days when a Puritan was discovered by his neighbor, "a hanging of his cat on a Monday for the catching of a rat on a Sunday," and holds that the statute [40] is not violated by a Sunday game on a vacant lot; to which no admission fee

day of the week, and all noise disturbing the peace of the day."

See, however, Re Rupp, 33 App. Div. 468, 53 N. Y. Supp. 927, holding that baseball playing on Sunday is a misdemeanor and is prohibited by this statute; and that therefore, a police officer who witnesses such a game is entitled to arrest such persons without a warrant under a statute providing that a peace officer may, without a warrant, arrest a person for a crime committed or attempted in his presence. No allusion is made in the opinion to the doctrine of *ejusdem generis*, and the court in quoting the Sunday statute merely italicizes the words "public sports" and summarily declares that Sunday baseball is prohibited by the statute. And it should also be observed that the games complained of were played in a public square of the city and that large crowds were habitually in attendance, from whom an admission fee was collected.

[35] People v. Dennin, 35 Hun, 327, 3 N. Y. Crim. Rep. 127.

[36] Com. v. Meyers, 8 Pa. Co. Ct. 435.

[37] State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L.R.A. 504.

[38] State v. Goode, 5 Ohio N. P. 179, 5 Ohio S. & C. P. Dec. 281.

[39] State v. Powell, 58 Ohio St. 324, 41 L.R.A. 854, 50 N E. 900, holding that a statute making it, among other things, an offense punishable by fine and imprisonment for anyone, on the first day of the week, commonly called Sunday, to play baseball or exhibit "any baseball playing," neither requires nor prohibits any religious observance, and does not therefore violate the right of conscience in matters of religion secured to the individual by the Bill of Rights.

[40] See note 34.

is charged, and which does not interrupt the repose and religious liberty of the community.[41] And Judge Cox, of the Indiana supreme court, sees the possibility of benefit to the populace which may witness baseball games, and holds that, since this possibility of benefit is sufficient to indicate an absence of purely arbitrary action on the part of the legislature in classification, the exemption of professional baseball players from the operation of the Sunday laws, while leaving the laws applicable to persons engaged in other occupations, does not grant them an unconstitutional privilege or immunity.[42] Indeed, the judge takes occasion to say a few pleasant things about baseball in these words: "The purpose of the required observance of Sunday as a day of cessation of the daily vocations of the people being based on sanitary reasons, it is obvious that the purpose in all cases could not best be carried out by the inertia of absolute rest. The wearing effects of the monotony of daily toil in office, store, factory, or whatever the lot of man is cast to labor, is overcome by diversion of mind no less than by the mere respite from the physical or mental strain. That baseball has come to be the one great American outdoor game; that it is played during the summer season throughout the land by boy and youth and man, beginner, amateur, and professional, in country village, town, and city; that it is played out of doors in seasonable weather; that it engages the mind alike of the participant and the spectator in an entertaining way; that it trains the body to vigor and activity, and, to a degree, the mind to alertness; that the playing of a game requires but a fraction of a half day; that it cannot be successfully played at night; that those who witness it find in it, for the time, a relief mentally and physically from the stress of the intense life we as a people lead,—are facts known of all men, and of which the courts and legislatures cannot be wholly ignorant. And we cannot say that the legislature did not have in mind that good might flow to many who, during all the secular days of the week, might be compelled to persist in continuous toil in office, store, shop, or factory, from spending a part of the afternoon of a Sunday in the open air, their minds diverted by interest in the popular game. And, too, it is well and commonly known that the season for baseball, both on account of the nature of the game and the actual practice, is short, that the hours of each day devoted to its pursuit by the players engaged in it are few, and that weather conditions enforce frequent pauses; and it cannot be said that the legislature did not conclude, as it might, that the welfare of players therefore needed no such restriction of their natural right to pursue their work on each of the seven days of the week, as might be necessary in other employments. The legislature may admittedly withdraw a class from the general anathema of the Sunday law for the purpose of a severer penalty, not for the good or relief of those constituting that class which would be involved in a cessation of their labor on that day, but for such good as might come therefrom to others of the community from added peace or quiet or other reason." Mayor Gaynor, of New York, takes a broad view of the matter, as is indicated by the following language used by him when a justice of the supreme court: "This is one of a class of cases in which it is the duty of the judiciary to speak out plain, after the manner of judges in times past. I therefore deem it not at all outside of my judicial office to add to what I have already said, that it is practically the unanimous sentiment of the religious and God-fearing people of the community, that it is far better for our grown boys and young men who have to work indoors all the week for a living, to go into the fields on Sunday afternoon after attending church, and participate in or witness good, elevating, healthy physical exercise, than to be driven instead to go to dance gardens, drinking places, pool rooms, and worse places; and there is no one trying to stir up any obscure or obsolete statute against that opinion except those who rule the police. Fathers and mothers would much rather know that their

[41] People v. Roach, 61 Misc. 42, 114 N. Y. Supp. 742.

[42] Carr v. State, — Ind. —, 32 L.R.A.(N.S.) 1190, 93 N. E. 1071.

grown sons are at a ball or golf game on Sunday afternoon, than not know where they are. Many of our boys and young men scarcely see the sun at all during the short days of the year, except on Sundays, and have no other day for outdoor exercise from one end of the year to the other. This is something which our ministers of the Gospel well know, and the significance of which they fully appreciate." [43] It should be borne in mind that Justice Gaynor was here addressing himself to the question whether the playing of a game of baseball on Sunday is itself a crime, or whether it becomes such only when it interferes with the peace and repose of the Sabbath. In a later case he pointed out that the statute was aimed particularly at "public" activities, holding that where the game is one to which the public is invited and an admission fee charged, it is embraced within the inhibition of the statute.[44] And a contemporary of Justice Gaynor, in indorsing the latter's distinction between private baseball and public baseball, and, in other words, between baseball the recreation, and baseball the business,—has this to say: "I agree that there is no prohibition against the man who is forced to labor during the week days, preventing him from enjoying himself in an orderly and decent manner on Sunday, so long as the repose of the community is not interrupted. But the prohibition is clear against Sunday games which are advertised, to which the general public are invited, and which they attend in great numbers, and to witness which money is charged directly or indirectly, or which are conducted for financial profit. This is not the wholesome recreation of the individual which the law will not prevent,—it may be sport, but it is public sport and a quasi business undertaking. This is prohibited by the legislature, whether wisely or unwisely it is no part of the court's duty to say. If the law is improper, the remedy is by application to the legislature for its repeal; it is not for the court to make the law, or to countenance its evasion. It is argued that there is no inherent evil in a game of baseball, and that attendance at such a sport by the public will keep them from less desirable resorts on Sunday; that on the whole the pastime is healthy and honest, and that where the locality is such that the quiet and decency of the community are not disturbed, no good reason exists for forbidding the games. This may be true, but the remedy is with the law-making power, and it would appear that, if these arguments are sound, the attention of the legislature should have been called to the matter before this." [45] So, the Texas court of criminal appeals, taking a liberal view of the question, holds that baseball playing is not within a statute imposing a fine upon the proprietor of any place of public amusement who shall permit it to be open for public amusements on Sunday, where the statute defines the term "place of public amusement" to mean circuses, theaters, variety shows, and such other amusements as are exhibited and for which an admission fee is charged. In the course of his opinion in this case, Judge Ramsey took occasion to say in effect that when it comes right down to the question of what is the one best sport, baseball must be awarded the palm. Not only that,—but let us listen to his own words: "It is known, of course, that baseball is the most generally practised, patronized, and approved of all the games of exercise, and that it is the cleanest and fairest of all manly sports, and excites rivalry in the youths of our land, and that every village and hamlet has its favorite nine, and that in every village and hamlet many ambitious youths dream of the day when they shall equal, if not excel, Matthewson, Speaker, Cobb, Napoleon Lajoie, and Honus Wagner." [46]

[43] People ex rel. Poole v. Hesterberg, 43 Misc. 510, 89 N. Y. Supp. 498.

[44] People v. Poole, 44 Misc. 118, 89 N. Y. Supp. 773, 18 N. Y. Crim. Rep. 407.

[45] Brighton Athletic Club v. McAdoo, 47 Misc. 432, 94 N. Y. Supp. 391.

[46] Ex parte Roquemore, 60 Tex. Crim. Rep. 282, 32 L.R.A.(N.S.) 1186, 131 S. W. 1101.

Civil or Criminal Liability for Injuries in Field Sports

BY CHARLES C. MOORE

Author of Moore on "Facts, a Treatise on the Weight and Value of Evidence."

HEN the Olympic games were revived in 1896 it was pre-eminently fitting that this most famous of the old panhellenic festivals should be celebrated at the city of Athens. Athletic feats of the ancient Greeks conspicuously appear in the relation of ordinary historical incidents of their time in our histories at the present day. The runner who sped from Athens to Sparta and back to Athens when the Persian invaders were approaching Marathon; the soldier who bore the news of Marathon to Athens, and dropped dead when he shouted the glad tidings to the aged men and the women on the walls of the city; the fleet messenger who, a few years later, was sent to the temple at Delphi for sacred fire, and expired with his supreme effort, as he delivered the precious burden on the territory which had been defiled by the presence of the Persians; the boy who represented the city of Messene at the Olympic games immediately after the city had been freed from the Spartan yoke, and who won the prize in the foot race, thereby conferring everlasting glory on his native place and creating a commotion throughout all Greece,—we know them all, after the lapse of twenty-five centuries, and the "record" time of two of them may still be read in our school histories. To the Olympic games has been attributed, in part, the unrivaled valor and strength of the Grecian soldiery. Is it an unreasonabel supposition that the immortal "Ten Thousand" effected their retreat largely because many of the band had been trained for the severe exercises at Olympia, and were thus enabled to withstand the hardships of their terrible march?

The Olympic spirit is again mighty in the world. "Thirty years ago the United States was not a country of athletes," says the New York Sun. "To-day it leads the world in track and field games, in boxing and wrestling, and in most of the manly sports. Competitive athletics have become the fashion and the rage in the United States, and are taken very seriously by the American people." Some one hundred and fifty athletes went from the United States to compete in the games at Stockholm a few weeks ago. With the people of England and America always deeply interested in athletics, and indulging in many games not practised at Olympia,—baseball, football, and the like,—where the individuals of contesting teams come into physical contact with one another and thereby multiply the chances of intentional or accidental personal injuries, and in view of the rather litigious disposition of English speaking peoples, it is a matter of surprise that the law reports contain so few cases growing out of happenings in our popular games.

In a single game, July 10, between the New York (Giants) and Chicago baseball clubs, three of the former were maimed and disabled for a week or two. While the injuries were comparatively trivial, the exigencies of the game may easily at another time produce serious results. And observe that the injuries to two of the three men were actually inflicted by the misfeasance, as distinguished from nonfeasance, of other and rival players, and possibly without any

contributory negligence of the injured men. Thus, a New York player with his hands on the bat and in proper position at the home plate, had his little finger smashed by a pitched ball, so that the flesh was lifted back from the bone and stitching was necessary. The Chicago second-baseman's spikes caught another player's finger as the latter was sliding to the base, making a wound that had to be sewed up. There can be no doubt that the pitcher and the second baseman in the foregoing instances would be liable, both civilly and criminally, for assault and battery if it could be proved that the painful injuries to the opposing players were purposely inflicted. Such violation of the rules of the game would forfeit the protection to which, as participants in a lawful sport, they might otherwise be entitled. They would not in a just sense be playing baseball. Adopting a locution familiar in the law of negligence, we might say the baseball game was only a condition, and not a cause. Surely, if King David had been called to account for having Uriah set "in the forefront of the hottest battle," he could not have defended himself by contending that he was merely exercising the authority of a commander in chief. And in time of war it would be possible for a soldier to be guilty of murder in taking an enemy's life. In the Agincourt campaign, Bardolph and Nym were hanged for stealing the enemy's property. King Henry V. *in loco.*

A considerable number of lives have been lost in the strenuous game of football. It is doubtful if as many fatalities have occurred in prize fighting. Why, then, is a prosecution for homicide in a prize fight a more serious matter for the defendant than a prosecution for homicide in a football game? In Foster's Crown Law, p. 258, the learned jurist, discussing "homicide caused by accident," says (italics are his): "This species of homicide is where a man doing a lawful act without intention of bodily harm to any person, using proper caution to prevent danger, unfortunately happeneth to kill. . . . In order to bring a case within this description, an act upon which death ensueth must be lawful; for if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter as circumstances may vary the nature of . . . [the act] . . . Death ensuing from accidents happening at sports and recreations, *such recreations being innocent and allowable*, falls within the rule of excusable homicide. . . . I would not be understood to speak here of prize fighting and public boxing matches, or any other exertions of courage, strength, and activity of the like kind which are exhibited for lucre, and can serve no valuable purpose but on the contrary encourage a spirit of idleness and debauchery; for these disorders will, I conceive, fall under a quite different consideration. As to playing at foils, I cannot say, nor was it ever said, that I know of, that it is not lawful for a gentleman to learn the use of the small sword; and yet that cannot be learned without practising with foils. . . . It is not sufficient that the act upon which death ensueth be lawful or innocent, it must be done in a proper manner and with due caution to prevent mischief. . . . This rule touching due caution ought to be well considered by all persons following their lawful occupations, especially such from whence danger may probably arise. . . . The law in these cases does not require the *utmost* caution that *can be* used; it is sufficient that a reasonable precaution, what is *usual and ordinary* in the like cases, be taken."

Reg. v. Bradshaw (1878) 14 Cox, C. C. 83, was a prosecution for manslaughter. The reporter's statement of facts is as follows: "The deceased met with the injury which caused his death on the occasion of a football match played between the football clubs of Ashby-de-la-Zouche and Coalville, in which the deceased was a player on the Ashby side and the prisoner was a player on the Coalville side. The game was played according to certain rules known as the 'association rules.' " At this place the reporter says in a note: "Etherington Smith, in opening the case for the prosecution, was proceeding to explain the 'association rules' to the jury, and to comment upon the fact of whether

the prisoner was or was not acting within those rules, when Bramwell, L. J., interposed, saying, 'Whether within the rules or not the prisoner would be guilty of manslaughter if while committing an unlawful act he caused the death of the deceased.' " "After the game had proceeded about a quarter of an hour," resumes the reporter, "the deceased was 'dribbling' the ball along the side of the ground in the direction of the Coalville goal when he was met by the prisoner, who was running towards him to get the ball from him or prevent its further progress; both players were running at considerable speed; on approaching each other the deceased kicked the ball beyond the prisoner, and the prisoner, by way of 'charging' the deceased, jumped in the air and struck him, with his knee, in the stomach. The two met not directly but at an angle, and both fell. The prisoner got up unhurt, but the deceased rose with difficulty and was led from the ground. He died next day after considerable suffering, the cause of death being a rupture of the intestines. Witnesses were called from both teams, whose evidence differed as to some particulars, those most unfavorable to the prisoner alleging that the ball had been kicked by the deceased and had passed the prisoner before he charged; that the prisoner had therefore no right to charge at the time he did, that the charge was contrary to the rules and practice of the game, and made in an unfair manner with the knees protruding; while those who were more favorable to the prisoner stated that the kick by the deceased and the charge by the prisoner were simultaneous, and that the prisoner had therefore according to the rules and practice of the game, a right to make the charge, though these witnesses admitted that to charge by jumping with the knee protruding was unfair. One of the umpires of the game stated that in his opinion nothing unfair had been done." Bramwell, L. J., in summing up the case to the jury, said: "The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourself with the rules of football. But on the other hand, if a man is playing according to the rules and practice of the game, and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury, and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act, and you must find him guilty; if you are of the contrary opinion you will acquit him." His lordship carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country all of which were no doubt attended with more or less danger. The jury returned a verdict of not guilty. Obviously the contest between Dares and Entellus would have been outlawed by Baron Bramwell's test, intention "to cause serious hurt."

Ast illum fidi aequales, genua aegra trahentem,
Iactantemque utroque caput, crassumque cruorem
Ore eiectantem mixtosque in sanguine dentes,
Ducunt ad naves. . . .

Reg. v. Moore, 14 Times L. R. 229, at the Leicester Assizes in 1898, is the only other reported case of a trial for manslaughter because of violence in the football field. Witnesses for the prosecution showed that in a match between

Aylestone and Enderby the prisoner was playing back for Enderby and the deceased was playing forward for Aylestone. The ball had been passed to the deceased and he dribbled it past the prisoner. The prisoner ran after the deceased, who kicked the ball rather hard towards the Enderby goal. The goal keeper ran forward to kick the ball and save his goal. Just as he kicked, the prisoner jumped, with his knees up against the back of the deceased, and threw him violently forward against the knee of the goal keeper. The deceased fell to the ground, but the prisoner was said not to have fallen at all. The deceased was seriously injured internally and died in a few days. The witnesses for the defense gave a different version of what had occurred. They said that the deceased ran against the goal-keeper's knee before the prisoner touched him at all, that the deceased then fell to the ground, and while he was on the ground the prisoner tripped over him and also fell. Mr. Justice Hawkins, in summing up, said that the rules of the game were quite immaterial, and it did not matter whether the prisoner broke the rules or not; that football was a lawful game but it was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to any other person; that no one had a right to use force which was likely to injure another, and if he did use such force and death resulted, the crime of manslaughter had been committed; and that if a blow were struck recklessly which caused a man to fall, and if in falling he struck against something and was injured and died, the person who struck the blow was guilty of manslaughter even though the blow itself would not have caused injury. After commenting upon the discrepancies in the testimony and the roughness of the game, he asked the jury whether or not the prisoner had used illegal violence. The jury found a verdict of guilty. The reporter says a strange feature of the case was that a young man who was playing in the same match, and who had given strong evidence against the prisoner before the magistrates, was himself killed a few weeks later in another football match.

In State v. Vines, 93 N. C. 493, 53 Am. Rep. 466, Merrimon, J., said: "It is clear that where one engaged in an unlawful or dangerous sport kills another by accident it is manslaughter. . . . This, however, would not be so if the sport were lawful, and not dangerous—in such case it would be no more than homicide by misadventure. There is a variety of cases in which a person causing the death of another without intending to inflict injury is criminally responsible, though not under the circumstances chargeable with murder. In such cases the test of responsibility depends upon whether the conduct of the party accused was unlawful, or, not being so, was so grossly negligent, reckless, or violent as necessarily to imply moral impropriety or turpitude."

"Play, even though rough or dangerous, if mutually engaged in, is not unlawful; otherwise, athletic games, now and always common to the people, would not have had the sanction which ages have given them," remarked Ellison, J., in Gibeline v. Smith, 106 Mo. App. 545, 80 S. W. 961, holding that if the parties to that action for damages "each voluntarily engaged in a friendly scuffle, and the defendant, without intending so to do, accidentally hurt the plaintiff, no action will lie."

Building a Corpus Juris

BY BURDETT A. RICH

JOHN D. Lawson, in the American Law Review for May and June, 1912, makes some very pungent, as well as illuminating, comments on "The Proposed American Corpus Juris," which ought to be read by everyone who has been interested in the prospectus of that enterprise. The exploitation of the plan through about sixty pages of the Green Bag (vol. 22, pp. 59-118) was an astonishingly ambitious and skilful piece of advertising. But it left the reader with a rather dim view of the outlines of the scheme. In the great array of commendations on the plan by distinguished lawyers, most of them went but little farther than to say that a corpus juris which would successfully accomplish what this one attempted would be of very great value; that is to say, that a great "edifice of law," sometime described by Judge Dillon as "primarily designed and adapted to daily use, which shall be at once symmetrical, harmonious, simple, and commodious," would be most desirable; or that the legal profession, lost as it is declared to be to-day "in the labyrinth of reported cases, and sailing, as it is, over the vast sea of the law without adequate chart or compass," is to have it all made plain by the statement of "our corpus juris." Just how this is to be accomplished is not made very plain. Three great claims are made as to what such a corpus juris would accomplish: 1. To bring about uniformity between the different states in the administration of justice. 2. To make the administration of justice more exact, and enable the average citizen to secure cheaper and more speedy justice. 3. To place America in the lead of the world in the field of jurisprudence, and enable her to exercise a more potent influence in world councils. Surely, all great judges and lawyers would welcome the publication of any work that would secure these results, and they can readily afford to express their approval of this enterprise if it will accomplish it.

Just what is the nature of the work proposed? It does not aim to construct a code of the law. Obviously, if it did, it would have to be made acceptable to all the lawmaking bodies in the United States and adopted by them. In reality it proposes, when analyzed, to do no more nor less than to make a new encyclopedia of the law. The men exploiting it may claim and believe that they can make a better one than either of those now in existence. That, of course, is a matter to be demonstrated. They estimate that all this can be accomplished, including "cost of advertising," at a total of "approximately $600,000." But Mr. Lawson says pertinently: "The sets of encyclopedias already published, even under the much-dreaded influence of commercialism, have each cost more than twice this amount." He adds: "The method of production contemplates the employment of a 'board of editors not exceeding seven men,' 'an associate board of editors to consist of about twenty,' and in addition to these 'a strong editorial force under the immediate direction of the board of editors,' 'an advisory council of twenty or twenty-five of the strongest men in the profession,' and also 'a board of criticism of at least one hundred, and perhaps two hundred, selected from among the ablest judges and lawyers on the bench and at the bar,'—'most enough cooks, it would seem, entirely to spoil the broth.' " The number of men for "the strong editorial force under the immediate direction of a board of editors" is not stated. There are about 1,000,000 cases in the British and American Reports which the promoters propose to classify in three general classes, namely: "A. Ruling cases, which establish rules, show the actual

law, and frequently overrule or modify leading cases. B. Leading cases, which indicate the original reason for rules and their valuable aids in the interpretation and application of principles. C. Illustrative cases, which, when properly classified, show the application of rules to different subjects and in different situations.

If, on the average, each editor should pass upon as many as fifty cases per day, and find out if they have been overruled or discredited, determine their relations to each other, settle their conflict, and find the underlying principles which ought to govern them, as he would have to do to make the proposed classification, it would need about 700 of them for one year. At salaries of, say, $2,500 a year, this part of the work alone would cost not less than $1,750,000; and their product would be merely the raw material to be used in the yet further and greater work of constructing this great American Corpus Juris that shall bring the laws of all the states into harmony, secure cheaper, more exact, and speedy justice, and lead the world in jurisprudence. What it would cost to pay for the constructive work of this kind to be done by seven editors-in-chief, about twenty associate editors, the advisory council of twenty or twenty-five of the strongest men in the profession, and the board of criticism of one or two hundred more, one can only guess.

The promoters estimate the bulk of the proposed work at twenty volumes of 1,000 pages each, including index and table of cases. Yet the latest of the existing encyclopedias of law, known as "Cyc," without any index or tables of cases, is nearly three times as large as this estimate. Moreover the table of cases for the Corpus Juris, if it included all English and American authorities, would itself occupy more than half of the allotted twenty volumes, unless the pages were of mammoth size and the type intolerably small. The indexes, if they were at all complete, would take all the rest of the twenty volumes; that is to say, if such indexes, for instance, as are found in text-books, like Cooley's Constitutional Limitations, Dillon's Municipal Corporations, Pomeroy's Equity Jurisprudence, or any other of the best text-books, were extended in proportionate bulk to include all the subjects of the law. The body of the Corpus Juris would remain to be housed elsewhere.

If a large part of the authorities were to be discarded as useless, the bulk would be reduced accordingly. Besides if the editors should assume the authority to abolish all decisions which they did not approve, they could more easily secure the certainty and uniformity of the law which the Corpus Juris is expected to bring. It is not certain, however, that the profession in this country wishes to delegate that authority to a board of editors. They may still wish to know the reasoning of those judges with whom the editors disagree. Some men of very great ability have written legal treatises in this country. Even the best of them did not make the law on that limited topic absolutely certain and uniform. It may be too much to expect that 200 men, more or less, can be secured who will do this for the whole body of our law even if they are well financed. Skepticism on this point, however, might be solved if the promoters of this great work would give us a sample of it in some ideal treatises on certain chosen divisions of the law, because, as a German friend used to say, "De proof in de puddin' is by eatin' of it."

Legal and Moral Aspects of Prize Fighting

BY JOHN D. CHAMBERLAIN
Of the Rochester (N. Y.) Bar

PRIZE fighting is of great antiquity. Its early history is involved in much obscurity. Who were the antediluvian professors of the art is a matter of conjecture. This we know, that Jupiter, over two thousand years ago, at Olympia, looked down from his lofty pedestal upon combatants who fought not with gloves or the naked hands, but armed with the deadly cestus, an instrument akin to the brass knuckles of modern times worn by footpads and the like. Whether these early followers of the manly art achieved much skill history fails to inform us.

We find pugilism or prize fighting gaining impetus in London in 1719, when James Figg, the first great boxer in England, flourished. It is said of Figg that he fought his way through life, ever ready to challenge anyone for love, money, or a "bellyfull," the only blow that put him out was that dealt by the Grim Reaper. During this early period such a challenge as the following taken from a London paper issued in 1742 was not uncommon: Whereas I John Francis, commonly known by the name of the jumping soldier, who have always had the reputation of a good fellow, and have fought several bruisers in the streets, etc.; nor am I ashamed to mount the stage when my manhood is called in question by an Irish braggadocia, whom I fought some time ago, in a bybattle for twelve minutes: and though I had not the success due to my courage and ability in the art of boxing, I now invite him to fight me for two guineas at the time and place above mentioned; where, I doubt not, I shall give him the truth of a good beating;" and its acceptance: "I Patrick Henley, known to everyone for the truth of a good fellow, who never refused anyone, on or off the stage, and fight as often for diversion of gentlemen as money, do accept the challenge of this Jumping Jack; and shall, if he don't take care, give him one of my bothering blows, which will convince him of his ignorance in the art of boxing." There is quite a contrast between this humorous method of advertising and that of the present day, when all manner of means is resorted to to gain notoriety, even to getting arrested.

Perhaps it may be a source of wonder to the reader why prize fighting which has long been under the ban of the law, prohibited by statute, denounced as a nuisance and crime, will not down. There are at least three prominent causes. One is the great notoriety given to it by the newspapers. It is the notoriety given by the newspapers to pugilists and their doings which produces each successive crop of them, and keeps alive the depraved interest in their contests. The failure to prohibit reports of such contests has been pointed out as an imperfection in the law. The silence of the press about them would be ten times more potent in suppressing these contests than the sheriff and police. It is the newspapers which make popular heroes of these pugilistic bruisers.

Another cause of the persistency of prize fighting is that it is a paying business. It pays the participants, the promoters, and many of its riff-raff followers. Two years ago this Fourth of July the winner of the world's championship

battle received $2,680 for each minute of actual fighting, and the loser received $2,600. Adding to this the amount they received for sparring exhibitions prior to the fight, the victor reaped the modest competence of $145,000, and the vanquished the still larger sum of $192,066. The recent fight for the world's championship, although a financial failure so far as the promoters were concerned, netted the winner $31,000 in cold cash.

Then, again, prize fighting is not without its defenders. One of these is Jack London, who writes: "This contest of men with padded gloves on their hands is a sport that belongs unequivocally to the English speaking race and that has taken centuries for the race to develop. It is no superficial thing, a fad of a moment or a generation. No genius or philosopher devised it and persuaded the race to adopt it as their racial sport of sports. It is as deep as our consciousness, and is woven into the fibres of our being. It grew as our very language grew. It is an instructive passion of our race. . . . "Our sport of prize fighting is hedged with ethical restrictions. It is synonymous with fair play. It is different from the fighting of the jungle, of which it is a development. There is absolutely no fair play in the jungle fighting. So has man improved. By that much has he climbed up the ladder of life. Don't rush his development too hard. He will climb higher . . . some day. Long, long from now, the ape and the tiger in us will completely die out, and our sports will come to consist of forensic, artistic, and ethical battles between our chosen champions. But in the meantime we are what we are, and there is no need to be ashamed of ourselves. Only by long and arduous evolution will the ape and the tiger go their way." Here is what a church trustee says: "If there were more fisticuffs there would be less gun play. I think every man who has rubbed shoulders with all sorts of men knows this to be true. If Italy had cherished the prize ring as sturdy England has, our police courts would not be congested with Italians carrying stillettos, and with their victims. If you are not familiar with the history of the prize ring, ask any expert where the sense of manly fair play is keenest. He will answer: In Great Britain and America. Ask him why this is so, and he will tell you that the prize ring bred it. Is this a little thing? Men unevenly matched may not contend in the ring; no man may be unfairly struck or bitten or kicked. Would it not be a good thing if these rules were brought into our business world? Could anything do more to make business struggles approximate to the Golden Rule, than to have a referee who should cry: Stop: you may not strike a man when he is down?" Another writer thinks that all this clamor against the sport arises from a basic misapprehension. "Those who assail it on the grounds of brutality and bestial depravity assume a false premise. People do not attend boxing exhibitions to glory over physical suffering, but to rejoice over an exhibition of skill and cunning, —the superlative mastery of an intricate science requiring more daring, more courage, more brilliance than that of any other sport." Still another writer, claiming that fair play and honesty are the first things looked for by the true admirer of pugilism, concludes his defense thus: "Come then! let thinking men who value their manhood set themselves in array, both against the army of those who, unmanly themselves, wish to see all others reduced to their own level, and against the vast following who, caught by such specious watchwords as "progress," "civilization," and "refinement," have unthinkingly thrown their weight into the falling scale. Has mawkish sentimentality become the shibboleth of the progress, civilization, and refinement of this vaunted age? If so, then in Heaven's name leave us a saving touch of honest, old-fashioned barbarism! That when we come to die, we shall die, leaving men behind us, and not a race of eminently respectable female saints."

And now comes A. J. Drexel Biddle, Philadelphia millionaire, amateur boxer, and practical pugilist, who proposes to mix boxing with religion, and out of the siftings bring forth a clean, manly sport. The rules prescribed by him to his pugilistic friends are, "Let the Chris-

tian spirit of fairness and absolute honesty guide you in the ring and out of it. . . . Go in for every manly sport you fancy, but let your games be played in the same spirit as though Christ were the referee." Mr. Biddle's scheme is probably practicable, and his idea of letting ministers pummel each other is not bad, but we cannot help picturing the gambling element betting their sesterces on the blood of the combatants.

The trouble with many of these defenders of the cause is that they confuse prize fighting with private sparring and boxing.

There can be no reasonable objection to boxing as ordinarily understood. It is manly, healthful, and vigorous training, and interference with it by the legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty. But when the art of self-defense degenerates into a public fight for money, the real danger comes. Mr. Roosevelt, a lover of boxing and all clean athletic sports, says: "The money prizes fought for are enormous, and are a potent source of demoralization in themselves, while they are arranged as either to be a premium on crookedness, or else to reward nearly as amply the man who fails as the man who succeeds. The betting and gambling upon the result are thoroughly unhealthy, and the moving-picture part of the proceedings has introduced a new method of money-getting and of demoralization."

An encounter between two well-trained pugilists probably would attract many of the better and law-abiding class of citizens, curious to see such a spectacle as a prize fight; but for every such reputable citizen thus attending there would be present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the country, men of idle, vicious, and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. To come down to rock bottom, prize fighting is pernicious to the young in that, among other reasons, it sets a false standard of manly virtues. It is a disgrace to the community, and affects the fair name and honor of the state, and of the city, and of their citizens. It makes a man's city a less desirable place to live in. It subjects him and his family to frequent contact in the street with improper characters in large numbers, and is humiliating to him as a citizen. It is a distinct step backward. The progress from barbarism to civilization is as slow as the grinding of the mills of the gods. Each generation sees but little of the advance of those things which are lofty and pure and uplifting, and can only find hopes for the future by comparison of the conditions which now are with those which have gone before. Society and mankind are constantly struggling against evil tendencies inherent in their nature, and as success in the effort comes, the community or man gradually becomes better, partaking of that higher quality which belongs to the plane of civilization mankind is destined to reach.

There is no such thing as preserving a moral status. A man advances or he retrogrades; he gets better or he gets worse; and so it is with the community. There is no such thing as standing still. By constant effort to overcome evil, evil is more easily overcome, and a high character in man is the outgrowth of a vigilant struggle against those tendencies which draw him down. It is so with the community. Such things as prize fighting retard our forward progress toward the better, and make us worse. They are degrading, and, being so, they are injurious to the moral tone of the community, and tend to make it and private standards lower. Let us see how the law has dealt with prize fighting.

What Constitutes a Prize Fight?

A prize fight is a pugilistic encounter or boxing match for a prize or wager. To be more specific: When two persons by previous agreement enter into a contest for supremacy by the administration of blows with the fist upon the bodies of each other, which contest, by the agreement, shall continue until one of them becomes a victor over the other, and when, by such agreement, there is to be given to the victor in such con-

test money or other thing of value, whether such money or other thing of value is the result of a wager between the parties, or a reward contributed by others, or the proceeds of door or gate receipts, this constitutes a prize fight. It is not essential to constitute a prize fight that the contest should be with the naked hand or fist. But the fact that the contest was had with gloved hands, as also the kind, size, and weight, and other characteristics of the gloves so used, may be looked to in connection with other evidence bearing upon the question whether such contest was a prize fight or merely a sparring or boxing exhibition. It is not necessary to constitute a prize fight that the agreement to enter into the contest should have been made for any particular length of time previous to the actual contest, but only that it should have been made and understood between the parties at some time, at least, however brief, before such contest began.

And while such agreement to contest for a prize or wager must be an agreement to contest until one of the parties obtains a victory over the other, it is not necessary that such contest should be maintained until such victory is actually obtained, or that it should be "fought to a finish."

Nor is it necessary that the prize wager or reward should actually be paid to either of the contestants; for if the prize fight is actually begun, the offense is complete, although its final consummation may have been prevented from any cause.

It is not necessary that the agreements to contest be made in any form of words or in writing. It is sufficient if the parties consent to the contract, either by words or gestures, and an agreement may be inferred from the conduct of the parties.[1] That the prize is to be equally divided between the contestants does not prevent a fight for which it is to be awarded from being a prize fight.[2] Not all physical contests for a prize or reward are punishable, under the statute, as prize fights. The contest must be a fight, and there must be an intent on the part of the contestants to do violence to and inflict some degree of bodily harm on each other. The evil designed to be remedied by statute is that class of brutal exhibitions for giving which considerable sums of money are paid, and the statute cannot be evaded by rewarding the unsuccessful as well as the successful combatant.[3] There must be an expectation of reward to be gained by the contest or competition, and an intent to inflict some degree of bodily harm upon the contestant.[4] A sham fight for the purpose of advertising one of the contestants, and without gate receipts or prize money, is not a prize fight.[5] Where the parties met before people who had paid admission to witness the encounter, intending to fight till one gave in from exhaustion, or injury received, it was held a breach of the law and a prize fight.[6] There may be a prize fight, although the fighting space is not marked off by ropes and there are no rules governing the contest.[7]

[1] State v. Moore, 5 Ohio S. & C. P. Dec. 689.

[2] Com. v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L.R.A. 280.

[3] State v. Purtell, 56 Kan. 479, 43 Pac. 782.

[4] People v. Taylor, 96 Mich. 576, 56 N. W. 27, 21 L.R.A. 287.

[5] People v. Floss, 27 N. Y. S. R. 225, 7 N. Y. Supp. 504.

[6] Reg. v. Orton, 14 Cox, C. C. 226, 39 L. T. N. S. 292.

[7] People v. Finucan, 80 App. Div. 407, 80 N. Y. Supp. 929.

Indictment.

The specific offense of prize fighting was unknown to the common law, the participants in such act being only punishable for an affray, riot, or an assault and battery according to the circumstances.

Under a statute which, in general terms, makes it "unlawful for any person to engage in prize fighting," it is not sufficient to indict by the use only of the statutory words, it is necessary to charge a fight for a reward or wager, in a public place, or where the public, or a part of it, is admitted as spectators. The offense can only exist where two persons engage in the unlawful art; the parties are severally guilty, but the guilt of each springs from the joint unlawful act; one man cannot commit the offense,

and it must be alleged and shown that they contended against each other.[8]

A person when lawfully called upon to aid a constable who is being prevented by the spectators from arresting individuals engaged in prize fighting is indictable for refusing to aid and assist a constable in the execution of his duty in quelling a riot. To support such an indictment it is necessary to prove: 1st. That the constable actually saw a breach of the peace committed by two or more persons. 2d. That there was reasonable necessity for calling upon other persons for assistance and support. 3d. That when defendant was duly called upon to render his assistance he refused to give it, without any physical impossibility or lawful excuse.[9]

Aiding and Abetting.

One who carries spectators to a prize fight does not aid or assist in bringing on or conducting such fight.[10] And one is not guilty of aiding and abetting a prize fight because he was present when the arrangement was made, and was on a boat going down the river to the place of contest, and gave money to one of the principals who was in his employ.[11]

But the owner of a barn in which a prize fight takes place, who rented it for a "smoker," with the privilege of a boxing contest, for which tickets reading, "Smoker, Jack Collier, Sam Chissel, one dollar," were sold or were handed around in his barroom, was held guilty of aiding and abetting a prize fight, he having made no effort to find out what use was to be made of the premises.[12]

It has been held that all persons aiding and abetting a prize fight are guilty of assault, and that the persons engaged in the fighting consented to punishment is no defense.[13] The agreement of aiders and abettors of a prize fight will bind the principals only when such agreement is made known to the principals before the contest.[14] An athletic club or gymnasium which aids or abets a prize fight is liable to indictment.[15]

Prize Fighting as a Crime.

The use of gloves in a prize fight does not make the combat any less an offense in the eyes of the law.[16]

It has been held that where two persons engage in a prize fight, and one, as a result of the beating received, languishes and dies, the other is guilty of manslaughter.

It has been held that all persons present and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree.[17] So, all persons who, by their presence, encourage a fight from which death ensues to one of the combatants, it has been held, are guilty of manslaughter, although they neither say nor do anything. But if the death be caused not by blows given in the fight itself, but by other parties breaking into the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable.[18]

Assault.

Persons who are present at a prize fight, and who have gone there with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow.[19]

All persons countenancing a prize fight are guilty of an offense.[20]

Consent is no defense to a charge of

[8] Sullivan v. State, 67 Miss. 346, 7 So. 275, 8 Am. Crim. Rep. 656.
[9] Reg. v. Brown, Car. & M. 314.
[10] Newport News & M. Valley R. Co. v. Com. 11 Ky. L. Rep. 96.
[11] People v. Floss, 27 N. Y. S. R. 225, 7 N. Y. Supp. 504.
[12] People v. Finucan, 80 App. Div. 407, 80 N. Y. Supp. 929.
[13] Reg. v. Coney, 15 Cox, C. C. 46, 51 L. J. Mag. Cas. N. S. 66, L. R. 8 Q. B. Div. 534, 46 L. T. N. S. 307, 30 Week. Rep. 678, 46 J. P. 404.
[14] State v. Moore, 5 Ohio S. & C. P. Dec. 689.
[15] Re Athletic Clubs, 5 Ohio S. & C. P. Dec. 696.
[16] Com. v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L.R.A. 280.
[17] Rex v. Hargrave, 5 Car. & P. 170.
[18] Rex v. Murphy, 6 Car. & P. 103.
[19] Rex v. Perkins, 4 Car. & P. 537.
[20] Rex v. Billingham, 2 Car. & P. 234, 31 Revised Rep. 665.

assault committed by participants in a boxing match.[21]

Riot or Affray.

The principals or seconds in a prize fight, although perhaps guilty of an assault, cannot be indicted for a riot or an affray where the fight takes place at a distance from any public highway, and, being at an end when the constables arrive, the parties yield on being required to do so.[22]

As to the affray, it must occur in some public place. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. (Id.)

Conspiracy.

Persons who agree to engage in a prize fight or pugilistic contest are guilty of conspiracy and subject to arrest.

That the contest is to be for scientific points and the fact that gloves are to be used is no defense when the evidence shows that a fight is intended.[23]

Refusal to Aid Officers.

Where a constable was prevented by the assembled spectators from arresting individuals engaged in a prize fight, persons lawfully called upon by the officer to aid him in arresting the participants were held guilty of refusing to aid a constable in the execution of his duty in quelling a riot, where they refused to come to his assistance without a valid excuse.[24]

License.

The mayor of a city may look behind the application of a first-class theater license, and if he finds that the only apparent purpose of an athletic club in obtaining it is to carry on public prize fights, may refuse it.[25]

Right to Enjoin a Prize Fight.

A private citizen cannot enjoin a prize fight which constitutes a public nuisance, unless he suffers some special injury from it.

So the right of a private citizen to an injunction against a proposed fight was denied where the evidence failed to show that he would be injured in any way by the fight.[26] The court said in this case that it did not appear that the value of petitioner's property would in any way be depreciated, or that the peace or quiet of his home be disturbed; that the persons who attend the prize fight may not pass his house, and whether or not a sufficient noise would be made to disturb anybody at his house was wholly a matter of conjecture.

A court of equity may, at the suit of the state, enjoin a property owner from permitting a prize fight there, under statutes making it the duty of all judges of courts to prevent and suppress prize fights, for which purpose they may "exercise all the powers vested in them for the prevention of crimes and misdemeanors." [27]

Sparring Exhibitions.

A mere exhibition of skill in sparring is not illegal.[28]

A sparring exhibition between two persons hired for the purpose at a certain compensation for each, without intention to harm each other, and without in fact doing any harm to each other, is not a prize fight within the meaning of an Ohio statute against prize fighting.[29]

Where a club admits the public to a boxing match or sparring exhibition in the same way as to theaters and other places of amusement, the exhibition may be public within the meaning of a statute making it a criminal offense to engage in, give, or promote a public boxing match or sparring exhibition, although to entitle an applicant to a ticket of admission he must sign a request to become a member of the club, it being a

[21] Bell v. Hansley, 48 N. C. (3 Jones, L.) 131.
[22] Reg. v. Hunt, 1 Cox, C. C. 177.
[23] Com. v. Sullivan, 16 W. N. C. 14.
[24] Reg. v. Brown, Car. & M. 314.
[25] People ex rel. Cumisky v. Wurster, 14 App. Div. 556, 43 N. Y. Supp. 1088.
[26] Louisville Athletic Club v. Nolan, 134 Ky. 220, 119 S. W. 800, 23 L.R.A.(N.S.) 1019.
[27] Com. v. McGovern, 116 Ky. 212, 75 S. W. 261, 66 L.R.A. 280.
[28] Reg. v. Orton, 14 Cox, C. C. 226, 39 L. T. N. S. 292.
[29] State v. Aston, 57 Ohio St. 672, 50 N. E. 1134.

question for the jury whether the machinery of the club is a mere sham and a fraudulent contrivance to evade the law.[30]

That the parties consented to engage in a boxing match is no defense to an indictment for a breach of the peace. Whether such a contest is a breach of the peace is a question for the jury to determine from the nature of the contest under proper instructions. Evidence that such matches are common in the colleges of this country is inadmissible.

It is not error to refuse to allow the jury to examine the boxing gloves used.[31]

Sparring is not unlawful unless the men fight on until they are in such a state of exhaustion that a dangerous fall is probable, and, except in this case, death caused by an injury received during a sparring match does not amount to manslaughter.[32]

[30] Com. v. Mack, 187 Mass. 441, 73 N. E. 534.

[31] State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

[32] Reg. v. Young, 10 Cox, C. C. 371.

In Justice Harlan's Footsteps

Mahlon Pitney, Associate Justice of the Supreme Court of the United States, was playing golf at Atlantic City when his wife telephoned him that he had been elevated by the President to the bench. "I resumed my golf game and made the last hole," he says, in relating the incident.

Any individual who can learn that he is to be an associate justice of the highest tribunal in the land, and can then drive with muscles unstrung and put with steady eye, demonstrates that he has in him the characteristics of a great man. One other sentence, however, in Mr. Justice Pitney's observations may be quoted. "I fear", he says, "that it will be some time before I become as great a golf player as Justice Harlan was."

Mr. Justice Pitney need not emulate Justice Harlan's golf; but if he shows himself as great a jurist as his distinguished predecessor the country will have no cause to regret his selection by the President of the United States.—Washington Herald.

Horse Racing and the Courts

BY ALMOND G. SHEPARD

ITH laggard step, public opinion has followed the lead of the court in condemning the practice of betting on the result of horse races. While the courts have always reprehended betting in general as of evil tendency and harmful to the public, the public itself, or a fair proportion of it, has tenaciously clung to the sport of horse racing, and as tenaciously to the habit of betting on the races as giving an added zest to the sport. The view of the English public countenancing wagers in general is clearly to be discerned in the English decisions, but the opinion of such of the American public as supported wagers has received scant recognition by the American courts. This difference of opinion may be found both in the construction of statutes against gaming in general, and in the different views as to the common law on the legality, in general, of wagers. By the early English courts, the common law was interpreted to sustain the right to bet or wager on any uncertain event, providing the event upon which the wager was dependent was not violative of public policy, morality, decency, etc.[1]

An interesting case in which are mentioned a great variety of subjects which are not proper matter for a wager is Da Costa v. Jones.[2] A case which, according to Lord Mansfield, made a great noise all over Europe, involving as it did a wager as to the sex of a person wearing the apparel of, and to all appearances, a man, and who had achieved considerable notoriety in the world, having, in the apparel and character of a man, fought in the wars of his or her country and even held the exalted position of Minister of State. Although this case fully sustains the lawfulness of wagers as to proper matters, as well as the right to enforce them in courts of law, nevertheless the court denies the right of third persons, merely for the purpose of laying a wager, wantonly to expose others to ridicule and libel them under a form of action, or expose their secrets by invoking the aid of a court to procure the evidence of their intimate friends and confidential attendants upon a delicate subject.

Wagering Contracts Enforced although Disapproved of.

While the Da Costa Case expressly sustains the validity of wagers on proper matters, a doubt is expressed not only in that case, but also in subsequent cases, as to whether the courts had not made a mistake in ever lending their aid to the enforcement of such contracts. Referring to this point, Lord Mansfield, in the course of his opinion, remarked: "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss, they have too long and too often been held good and valid contracts; but notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties by laying a wager shall not be permitted to form a ground for an action or a judicial proceeding in a court of justice." On the same subject in a later case,[3] Ashurst, J., remarked: "All wagers are foolish things. It is throwing away the money of the parties and trifling with the time of the

[1] Da Costa v. Jones, Cowp. pt. 2, p. 729; Good v. Elliott, 3 T. R. 693, 1 Revised Rep. 803, 12 Eng. Rul. Cas. 389; Chitty, Contr. § 468; Misner v. Knapp, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65; Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774; Harris v. White, 81 N. Y. 532; McLain v. Huffman, 30 Ark. 428.

[2] Cowp. pt. 2, p. 729.

[3] Good v. Elliott, 3 T. R. 693, 12 Eng. Rul. Cas. 389.

judges and juries to call on them to determine such questions, and I wish they were abolished. But where any public grievance or inconvenience exists not provided for by law, it of right belongs to the legislature by our Constitution to remedy such grievance, and it would be dangerous if courts of justice were to assume such power." Said Lord Kenyon, Ch. J., in the same case: "I entirely agree . . . that wagers have gone to an extent which is much to be complained of, and if we were sitting here in a legislative capacity, it might perhaps be prudent to declare that no wagers whatever ought to be allowed."

Strong language in disapproval of the courts assuming jurisdiction in this class of cases is also to be found in Gilbert v. Sykes,[4] wherein it is said that "the discussion which has been had of this case has strongly illustrated the inconvenience of countenancing idle wagers in courts of justice. It occupies the time of the court and diverts their attention from causes of real interest and concern to the suitors, and I think it would be a good rule to postpone the trial of every action upon idle wagers till the court had nothing else to attend to."

This thought has been expressed by some of the American courts in very vigorous language. Thus, in Eldred v. Malloy,[5] the court says: "The courts of this territory have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice, or the character of a card that may be turned up. If we enter upon the work of settling bets made by gamblers in one case, especially on the time when the Colorado Central Railroad reaches Golden, or when it will reach Georgetown, we may despair of ever finding time for the despatch of those weightier matters which affect the personal and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable that we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling; penalties are prescribed against gaming, and I can see no difference in principle in the bet that the faro dealer will turn up a jack the next turn, and the bet that the railroad will be built to Table Mountain in so many days." And in Love v. Harvey,[6] it is said: "It is inconsistent alike with the policy of our laws and with the performance of the duty for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager."

Said Sergeant, J., in Edgell v. McLaughlin:[7] "In the innumerable contentions that human affairs originate, there is sufficient to engross the time and labor of its tribunals, without occupying them in the investigation of gratuitous contests, such as wagers, which flow sometimes from a spirit of gambling, sometimes from heat of passion, and sometimes from folly and indiscretion, on the one side, and stratagem and cunning on the other."

Adjudicating Questions Relative to Wagers Is Beneath Dignity of Court.

The doctrine of the English courts, in assuming jurisdiction to adjudicate questions arising out of bets or wagers, was enunciated at a time when ordinary contentions which human affairs originated did not so fully engross the time and labor of the courts as they do now, and the courts doubtless did not foresee the avalanche of trivial matters they were thus launching upon the sea of jurisprudence. When the trivial, and oftentimes indecent and impertinent, character of many of the questions raised in the English courts of law relative to wagers is considered, the attitude of the American courts, in refusing to lend their aid or give relief in matters relating to bets or wagers, is commendable, and must increase the respect of the public at large for the courts. Indeed the very fact that jurisdiction was in early times assumed in this class of cases

[4] 16 East, 149.
[5] 2 Colo. 320, 25 Am. Rep. 752.
[6] 114 Mass. 80.
[7] 6 Whart. 176, 36 Am. Dec. 214.

serves strongly to emphasize the much higher plane or standard of the courts at the present time as compared with the courts at an earlier period. The fact that the courts of the present day have so seldom been called upon to pass upon idle bets or wagers is creditable alike to the position taken by the courts and to the public at large, many of whom, while still indulging in bets and wagers, dispose of questions arising with reference thereto as questions of honor, or leave them undisposed of. Although anti-gaming or gambling statutes are now to be found in most of the states, yet even without the aid of these statutes it is inconceivable that a court of the present time would be asked to adjudicate questions relating to wagers which the courts of an earlier time were asked to and frequently did pass upon. It is safe to say that, regardless of statute, no officer of a court would have the hardihood to present to it for adjudication such questions as the following: A wager as to the sex of an adult person of prominence and standing, Da Costa v. Jones,[8] or whether a certain woman would be delivered of a male child within a certain time, Ditchburn v. Goldsmith;[9] the sex of an unborn child, referred to in the Da Costa Case,[10] the validity of a marriage,[11] which one of the players at backgammon was bound to move a man,[12] the ownership of a wagon,[13] which of the fathers of the bettors should live the longest,[14] the result of a case then pending in court,[15] when a certain man would be King of England,[16] the length of life of Napoleon Bonaparte,[17] which dog would be the victor in a dog fight,[18] which carriage a certain person would hire,[19] the date when one of the parties to the bet would marry,[20] or the weight of a hog.[21]

[8] Cowp. pt. 2, p. 729.
[9] 4 Campb. 152.
[10] Cowp. pt. 2, p. 729.
[11] Coxe v. Phillips, Cas. t. Hardw. 237.
[12] Pope v. St. Leger, 1 Salk. 344.
[13] Good v. Elliott, 3 T. R. 693, 1 Revised Rep. 803, 12 Eng. Rul. Cas. 389.
[14] March v. Pigot, 5 Burr. 2802.
[15] Jones v. Randall, Cowp. pt. 1, p. 37, Lofft, 383, 428.
[16] Walcot v. Tappin, 1 Keble, 56; Andrews v. Herne, 1 Lev. 33.
[17] Gilbert v. Sykes, 16 East, 150, 14 Revised Rep. 327.
[18] Egerton v. Furzeman, 1 Car. & P. 613, Ryan & M. 213.

Attitude of American Courts.

In America, as already shown by their remarks on the question, many courts have refused to adopt the view of the English court as to the validity of wagers at common law, or, at least, as to their enforceability in courts of law, and some of the courts have applied this ruling to bets on horse races as well as to wagers in general.[22]

A very potent reason is given in a California case for the court refusing to take jurisdiction even in matters relating to bets on horse races. The court says: "The impropriety of the courts entertaining such actions as this is well illustrated by the circumstances of the present case, for it appears from the record to have been conceded in the court below that the right of the plaintiff to recover depended upon the question whether the wager made was a 'by bet' or a 'time bet.' To determine this question, several witnesses were introduced who gave their opinions in the matter, and we have been cited by counsel to the 'Spirit of the Times' and the 'Rules of the National Trotting Association' as authorities upon the proposition. These are, we believe, standard authorities in turf matters; but cases which depend

[19] Eltham v. Kingsman, 1 Barn. & Ald. 683.
[20] Hartley v. Rice, 10 East, 22, 10 Revised Rep. 228.
[21] Mulford v. Bowen, 9 N. J. L. 315.
[22] Eldred v. Malloy, 2 Colo. 320, 25 Am. Rep. 752; Wheeler v. Spencer, 15 Conn. 28; Cleveland v. Wolff, 7 Kan. 184; Lewis v. Littlefield, 15 Me. 233; Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755; Wilkinson v. Tousley, 16 Minn. 299, Gil. 263, 10 Am. Rep. 139; Love v. Harvey, 114 Mass. 80; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Ball v. Gilbert, 12 Met. 397; Grace v. M'Elroy, 1 Allen, 563; Beattie v. Hoyt, 3 Mont. 142; Winchester v. Nutter, 52 N. H. 507, 13 Am. Rep. 93; Hoit v. Hodge, 6 N. H. 104, 25 Am. Dec. 451; Perkins v. Eaton, 3 N. H. 152; Joseph v. Miller, 1 N. M. 621; Bernard v. Taylor, 23 Or. 416, 37 Am. St. Rep. 693, 31 Pac. 968, 18 L.R.A. 859; Edgell v. McLaughlin, 6 Whart. 176, 36 Am. Dec. 214; Phillips v. Ives, 1 Rawle, 37; Pritchet v. Insurance Co. of N. A. 3 Yeates, 458; Stoddard v. Martin, 1 R. I. 1, 19 Am. Dec. 643; Rice v. Gist, 1 Strobh. L. 82.

upon them for their solution have no place in the courts. If, notwithstanding the evil tendency of betting on races, parties will engage in it, they must rely upon the honor and good faith of their adversaries, and not look to the courts for relief in the event of its breach." [23]

In other states the general doctrine has been stated that wagers or bets are valid at common law if the subject-matter thereof is not illegal or immoral, or void on the ground of public policy.[24] In but few of these cases, however, was the question squarely presented, and in but three of them did the court squarely recognize any obligation to enforce bets on matters with reference to which the parties had no interest. The only cases of those referred to which involve idle bets in which the parties were not interests in the event are Smith v. Smith,[25] which was a bet on the result of an election in another state, made after the vote had been cast; and Morgan v. Pettit,[26] a case in the same jurisdiction, where the facts were very similar; and Mulford v. Bowen,[27] which involved a bet on the weight of a hog. In the latter case the question as to the validity of the claim because it was a wager was not raised or considered by the court, and the plaintiff was denied the right to recover on the bet, because it was not properly set forth in his declaration. It therefore cannot, with any degree of assurance, be said that the enforceability of wagers in courts at law has ever received even a partial recognition by the courts of this country, especially where the bet was a mere idle wager relating to an event in which the parties had no interest. The mere statement or assertion that bets at common law were valid is not sufficient to commit the court to the rule that such bets are enforceable, since a bet may be lawful and yet the court refuse to enforce it.[28]

Wagers on Horse Races.

While, as heretofore stated, the courts lead, rather than follow, public opinion in condemning betting and gambling in general, nevertheless public sentiment has in some degree influenced the position taken by the court, as well as the legislature, in dealing with the question. This is especially true as to horse racing and bets on horse races. The validity and enforceability of bets on horse races at common law as interpreted by the English courts is well sustained, the theory being that the mere making of a bet is not an illegal act.[29] And horse racing not being *per se* unlawful, bets thereon are accordingly within the rule of wagers on the results of lawful events, and hence are valid.[30]

Not only are bets on horse races valid at common law as interpreted by the English court, but they are also expressly authorized by statute, subject, however, to some regulations as to the place of racing and the amount that may be bet on the races.[31] The courts in some jurisdictions of Canada have also held that horse racing is legal at common law, as well as bets thereon, and that neither come within the ordinary statutes against gaming.[32]

[23] Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110.

[24] Grant v. Hamilton, 3 McLean, 100, Fed. Cas. No. 5,695; Tindall v. Childress, 2 Stew. & P. (Ala.) 250; Johnson v. Fall, 6 Call. 359, 65 Am. Dec. 518; Jeffrey v. Ficklin, 3 Ark. 227, 36 Am. Dec. 456; Wheeler v. Spencer, 15 Conn. 28; Porter v. Sawyer, 1 Harr. (Del.) 517; Smith v. Smith, 21 Ill. 244, 74 Am. Dec. 100; Morgan v. Pettit, 4 Ill. 529; Beadles v. Bless, 27 Ill. 320, 81 Am. Dec. 231; Sipe v. Finarty, 6 Iowa, 394; Greathouse v. Throckmorton, 7 J. J. Marsh. 17; Waddle v. Loper, 1 Mo. 635; Mulford v. Bowen, 9 N. J. L. 315; Bunn v. Riker, 4 Johns. 427, 4 Am. Dec. 292; Stoddard v. Martin, 1 R. I. 1, 19 Am. Dec. 643.

[25] 21 Ill. 244, 74 Am. Dec. 100.

[26] 4 Ill. 529.

[27] 9 N. J. L. 315.

[28] Thacker v. Hardy, L. R. 4 Q. B. Div. 685, 48 L. J. Q. B. N. S. 289, 39 L. T. N. S. 595, 27 Week. Rep. 158; Fitch v. Jones, 1 Jur. N. S. 854, 5 El. & Bl. 238, 24 L. J. Q. B. N. S. 293, 3 Week. Rep. 507.

[29] Lester v. Quested, 85 L. T. N. S. 487, 66 J. P. 54, 50 Week. Rep. 207.

[30] M'Allester v. Haden, 2 Campb. 438; Blaxton v. Pye, 2 Wils. 309; Gibbons v. Gouverneur, 1 Denio, 170; Misner v. Knapp, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65.

[31] Challand v. Bray, 11 L. J. Q. B. N. S. 204, 6 Jur. 626, 1 Dowl. N. S. 783; Evans v. Pratt, 3 Mann. & G. 759, 6 Jur. 152, 4 Scott, N. R. 378, 1 Dowl. N. S. 505, 11 L. J. C. P. N. S. 87; Bentinck v. Connop, 8 Jur. 336, 5 Q. B. 693, Dav. & M. 538, 13 L. J. Q. B. N. S. 125.

[32] Rex v. Ellis, 20 Ont. L. Rep. 218.

Wagers on horse races have also been sustained in some American courts. This is particularly true as to the courts of Texas. In this state the courts, while holding bets in general to be unenforceable in the courts of that state, nevertheless make an exception as to bets on horse racing, and these bets are held to be valid and enforceable obligations.[33] In Louisiana, the rule is asserted that a contract to run horse races is not prohibited by law, and money lost on a race may be recovered by action at law. Such contracts, however, are said to be regarded with suspicion, and the judge is authorized to reject the entire demand when the same appears to him to be excessive.[34] In North Carolina by an early statute, it was provided that no money should be recovered at law by means of any bet or wager on a horse race, except a written obligation is produced on the trial, containing the sum bet or laid on such horse race, signed, sealed, and attested by at least one witness. This statute has been held to be valid and enforced repeatedly by the courts of that state.[35] And in Wisconsin, it has been asserted that the mere trotting or racing of horses when in a proper manner, and not in the public streets or highways, is not an illegal act at common law.[36] The Delaware court has refused to regard as illegal and void a bet on a horse race run in another state wherein horse racing is not illegal. The court said that neither the race nor the bet were immoral *per se*.[37] Bets on horse races have been sustained in South Carolina, under a statute which was directed only against deceitful and excessive betting, fair and moderate betting being regarded as innocent and lawful, the limit to be lost in one transaction being fixed at £100.[38] As already seen in a majority of the American jurisdictions, however, the courts refuse to enforce bets on horse races (see cases supra, 22), and they generally hold that such bets are gaming within the usual and ordinary statutes against gambling, in so far as making the obligations based thereon invalid or permitting a recovery of amounts thus lost. Thus money lost in bets on horse races is generally held to be recoverable under statutes providing for the recovery of money or property bet or lost on games.[39] In a Canadian jurisdiction it has, however, been held that money bet on a foot race cannot be recovered from the winner after it has been paid him by the stakeholder, and that the winner of a bet on a foot race is not liable to the loser for money received by the former from the stakeholder.[40] Statutes making void obligations given for money lost at gaming are generally held to cover obligations for money lost in bets or wagers on horse races.[41] The courts are not, however, so inclined to construe bets on horse racing as gaming, within the provisions of criminal statutes against gaming, keeping and maintaining gambling devices, and the like. Thus horse racing is not a gambling device within the meaning of statutes against such devices,[42] but the words "any device" used in a statute against keeping a house or place for public gaming covers a house or place kept to enable the placing of bets or wagers on horse races.[43] And a horse

[33] Dunman v. Strother, 1 Tex. 89, 46 Am. Dec. 97; McElroy v. Carmichael, 6 Tex. 454; Kirkland v. Randon, 8 Tex. 10, 58 Am. Dec. 94; Wheeler v. Friend, 22 Tex. 683; Armstrong v. Parchman, 42 Tex. 185; Walker v. Armstrong, 54 Tex. 609.

[34] Grayson v. Whatley, 15 La. Ann. 525.

[35] Hunter v. Bynum, 3 N. C. (2 Hayw.) 354; Hunter v. Parker, 3 N. C. (2 Hayw.) 178; Farrell v. Patteson, 3 N. C. (2 Hayw.) 362; Hunter v. Stroud, 3 N. C. (2 Hayw.) 403; Hunter v. Jackson, 4 N. C. (1 Car. Law Repos. 250).

[36] Porter v. Day, 71 Wis. 296, 37 N. W. 259.

[37] Ross v. Green, 4 Harr. (Del.) 308.

[38] Barret v. Hampton, 2 Brev. 226.

[39] Tatman v. Strader, 23 Ill. 493; Garrison v. McGregor, 51 Ill. 473; Richardson v. Kelly, 85 Ill. 491; Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726; Dyer v. Benson, 69 Ga. 609; Wade v. Deming, 9 Ind. 35.

[40] Seely v. Dalton, 36 N. B. 442.

[41] Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189; Joseph v. Miller, 1 N. M. 621; Blaxton v. Pye, 2 Wils. 309. This doctrine, however, has been denied in some jurisdictions. Bailey v. McDuffee, 18 N. B. 26; McDevitt v. Thomas, 130 Ky. 805, 114 S. W. 273.

[42] State v. Lemon, 46 Mo. 375; State v. Hayden, 31 Mo. 35; People v. Engeman, 129 App. Div. 462, 114 N. Y. Supp. 174, affirmed in 195 N. Y. 591, 89 N. E. 1107; State v. Shaw, 39 Minn. 153, 39 N. W. 305, 8 Am. Crim. Rep. 321; McElroy v. Carmichael, 6 Tex. 454.

[43] James v. State, — Okla. Crim. Rep. —,

race on the result of which bets or wagers are laid is a game of chance within the meaning of a statute against maintaining gambling devices for the purpose of playing any game of chance for money or property.[44] Statutes aimed against any game of hazard or skill do not embrace horse racing or bets thereon.[45] Neither is a horse race a game within the meaning of a statute prohibiting persons from engaging in any hazard or game on which money or property is bet, won, or lost;[46] nor is it a game within the meaning of a statute against betting on or playing at any gaming table, bank, or device.[47] And betting on horse races is not gaming within a statute against one person inducing another to visit a place where gaming is carried on.[48] A place where pools on horse races are sold is a place where gambling is carried on or permitted;[49] and pool selling on horse races is within an act for the better suppression of gambling.[50] But pool selling on horse races is not an offense within the meaning of a statute prohibiting games by gambling devices for money or property.[51]

Particular Contracts Relating to Horse Races.

In England a subsequent promise to pay money lost in bets on horse races is enforceable where made for the purpose of inducing the creditor to refrain from announcing the loser on an exchange or in a club as a defaulter.[52] Where the subsequent promise to pay is procured by a threat to publish the loser to a certain club,—it is immaterial that the loser is not a member of the club,—the promise is nevertheless based on a sufficient consideration.[53] To bring a promise within this rule, it is necessary not only to prove the promise, but also to show that it is based upon a good consideration. Merely a request for forbearance, and to keep the matter quiet, without any request further than that, or any specific promise to pay, is not sufficient, and this is true although the losing bettor is a member of a club, and it would injure him to publish in the club his failure to pay his bet.[54] And a promise to pay a less sum as a compromise of a larger amount claimed on a bet does not create a binding obligation as to the subsequent promise.[55]

That a note given for a portion of the purchase price of a horse is not to be due and payable until the horse won a race does not render the note unenforceable,[56] but it has been held that a judgment rendered on a note given to cover a bet on a horse race is absolutely void, and will be so declared in equity.[57] An agreement in the sale of a horse, that within a given time it is to trot at a stated speed or the seller will repay one-half the amount that the failure so to do shall detract from the value of the horse, has been held to be a wagering contract and void.[58] The court regarded this case as within the principle of Brogden v. Marriott,[59] holding to be unlawful as a wagering contract an agreement in the sale of a horse that if within a stated time the horse trotted 18 miles in an hour, the purchaser was to pay £200

113 Pac. 226, 33 L.R.A.(N.S.) 827; James v. State, 63 Md. 242; Thrower v. State, 117 Ga. 753, 45 S. E. 126, 15 Am. Crim. Rep. 315.

[44] Miller v. United States, 6 App. D. C. 6.

[45] State v. Rorie, 23 Ark. 726.

[46] Louisville v. Wehmhoff, 116 Ky. 845, 76 S. W. 876, 79 S. W. 201; Cheek v. Com. 100 Ky. 1, 37 S. W. 152; Com. v. Shelton, 8 Gratt. 592.

[47] Harless v. United States, Morris (Iowa) 169.

[48] Cheek v. Com. 100 Ky. 1, 37 S. W. 152.

[49] State v. Shanklin, 51 Wash. 35, 97 Pac. 969; Opinion of Justices, 73 N. H. 625, 63 Atl. 505, 6 Ann. Cas. 689; Swigart v. People, 154 Ill. 284, 40 N. E. 432; People v. Weithoff, 51 Mich. 203, 47 Am. Rep. 557, 16 N. W. 442; Cheek v. Com. 100 Ky. 1, 37 S. W. 152; Com. v. Shelton, 8 Gratt. 592.

[50] State v. Stripling, 113 Ala. 120, 21 So. 409, 36 L.R.A. 81.

[51] State v. Ayers, 49 Or. 61, 124 Am. St. Rep. 1036, 88 Pac. 653, 10 L.R.A.(N.S.) 992.

[52] Hyams v. Stuart King [1908] 2 K. B. 696, 77 L. J. K. B. N. S. 794, 99 L. T. N. S. 424, 24 Times L. R. 675, 52 Sol. Jo. 551; Wilson v. Conolly, 103 L. T. N. S. 461, 27 Times L. R. 7; Hodgkins v. Simpson, 25 Times L. R. 53; Bubb v. Yelverton, L. R. 9 Eq. 471, 39 L. J. Ch. N. S. 428, 22 L. T. N. S. 258, 18 Week. Rep. 512.

[53] Cohen v. Ulph, 25 Times L. R. 710.

[54] Ladbroke v. Buckland, 25 Times L. R. 55.

[55] Chapman v. Franklin, 21 Times L. R. 515.

[56] Treacy v. Chinn, 79 Mo. App. 648.

[57] Martin v. Terrell, 12 Smeedes & M. 571.

[58] Hall v. Bergen, 19 Barb. 122.

[59] 3 Bing. N. C. 88, 2 Scott, 712, 2 Hodges, 136, 5 L. J. C. P. N. S. 302.

for her, and if she failed to do so, he was to pay but one shilling. An obvious distinction between the two cases is that the difference in the amount to be paid in case the horse won and the amount should the horse fail to perform the feat, in Brogden v. Marriott, was so great as to suggest a wager, while in Hall v. Bergen the difference would suggest a purpose on the part of the parties each to stand a share of the loss from the estimated value of the horse if it did not trot at the speed stipulated.

Validity of Bet as to Stakeholders and Other Third Persons.

The depositor of money on a horse race may repudiate the same before the race and recover the amount deposited with the stakeholder;[60] and the loser at a race may recover the amount of his deposit from the stakeholder after the termination of the race, if demand therefor is made before the stockholder has paid the money over to the winner.[61] But where money deposited on a horse race is paid to the winner by the stakeholder, the loser cannot recover from the stakeholder the amount paid him, he not having given notice not to pay the money before its payment.[62] A stakeholder of money bet on a horse race is not, however, liable to the winner for more than his own deposit, where, by statute, bets on horse races are illegal and void.[63] But a person receiving the proceeds of a bet for another is liable to the latter for the full amount received, and it is no defense that the money was received under or in payment of a wager.[64] And the fact that money was obtained to bet on a horse race has been held no bar to a recovery of the money where it was obtained by false and fraudulent representations rendering the contract void, and hence preventing the title to the money from passing by delivery.[65] Although an action cannot be maintained to compel the loser of a bet on a horse race to pay the amount of the bet,[66] nevertheless one person betting on a horse race, at the request of another, may recover the amount he thus loses.[67] But under the gaming act of 1892, it has been held that a person paying for another, at his request, money lost in bets on horse races, cannot recover same.[68]

Horse Racing for Premiums or Prizes.

A distinction is very generally made between racing for rewards or prizes and bets on races, and the former has been held to be within the favor of the court, the purpose being to awaken interest in the matter of improving the product of horses; but a somewhat different conclusion is reached in a Pennsylvania case, influenced, however, by a statute somewhat different in language than the ordinary statutes permitting horse racing at county fairs and other associations of this character.[69] And the same may be said of Bronson, Agri. & Breeders' Asso. v. Ramsdell,[70] a Michigan case. The statutes construed in these two cases are sufficiently different to distinguish the cases from those sustaining the validity of horse races for prizes or premiums offered by

[60] Trimble v. Hill, 49 L. J. P. C. N. S. 49, L. R. 5 App. Cas. 342, 42 L. T. N. S. 103, 28 Week. Rep. 479.

[61] Diggle v. Higgs, L. R. 2 Exch. Div. 422, 25 Week. Rep. 777, 46 L. J. Exch. N. S. 721, 37 L. T. N. S. 27, 6 Eng. Rul. Cas. 482; Batson v. Newman, L. R. 1 C. P. Div. 573, 25 Week. Rep. 85; Ivery v. Phifer, 11 Ala. 535; Hayden v. Little, 35 Mo. 418; Moore v. Trippe, 20 N. J. L. 263; Huncke v. Francis, 27 N. J. L. 55; Forrest v. Hart, 7 N. C. (3 Murph.) 458; Conklin v. Conway, 18 Pa. 329; Ward v. Holliday, 87 Neb. 607, 127 N. W. 882; Wilkinson v. Tousley, 16 Minn. 299, Gil. 263, 10 Am. Rep. 139; Ball v. Gilbert, 12 Met. 397.

[62] Wood v. Wood, 7 N. C. (3 Murph.) 172.

[63] McLain v. Huffman, 30 Ark. 428.

[64] De Mattos v. Benjamin, 63 L. J. Q. B. N. S. 248, 70 L. T. N. S. 560, 42 Week. Rep. 284, 10 Reports, 103; Bridger v. Savage, 54 L. J. Q. B. N. S. 464, L. R. 15 Q. B. Div. 363, 53 L. T. N. S. 129, 33 Week. Rep. 891, 49 J. P. 725.

[65] Re E. J. Arnold & Co. 133 Fed. 789.

[66] Thorpe v. Coleman, 1 C. B. 990, 9 Jur. 903, 14 L. J. C. P. N. S. 260.

[67] Bubb v. Yelverton, 24 L. T. N. S. 822; Read v. Anderson, 53 L. J. Q. B. N. S. 533, L. R. 13 Q. B. Div. 779, 51 L. T. N. S. 55, 32 Week. Rep. 950, 49 J. P. 4; Oulds v. Harrison, 10 Exch. 572, 24 L. J. Exch. N. S. 66, 3 C. L. R. 353, 3 Week. Rep. 160.

[68] Tatam v. Reeve [1893] 1 Q. B. 44, 62 L. J. Q. B. N. S. 30, 67 L. T. N. S. 683, 41 Week. Rep. 174, 57 J. P. 118; Keep v. Stevens, 100 L. T. N. S. 491, 73 J. P. 112.

[69] Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774.

[70] 24 Mich. 441.

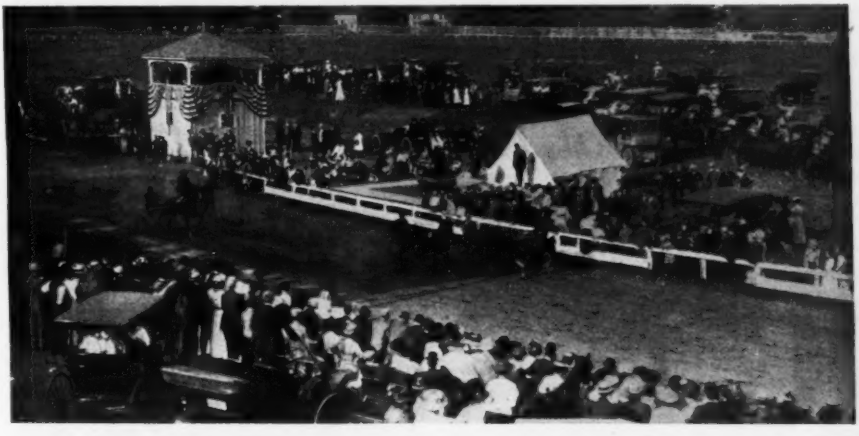
fairs and racing associations or clubs.

In line with the weight of the cases sustaining the validity of horse races under the supervision of associations, etc., for prizes and premiums, it has been held that paying expense money to an association for the privilege of competing in a horse race in which purses are offered is not gaming.[71] Pools and sweepstakes in the result of such races, however, are gambling and unlawful.[72] But a stakeholder holding a pool to be distributed according to the outcome of a race, who pays the money according to the terms of the pool to the winners, without notice from any of the depositors not to do so, is not thereafter liable to the losers for the return of the money deposited by them.[73]

[71] Hankins v. Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L.R.A. 76.

[72] Bride v. Clark, 161 Mass. 130, 36 N. E. 745; Barker v. Mosher, 60 N. H. 73; Gibbons v. Gouverneur, 1 Denio, 170.

[73] Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306.



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THE TROTTING MATCH AT THE COUNTY FAIR

Among the recreations of the English-speaking people for many centuries has been that of horse racing. It takes a good horse to run a good race. These tests of strength, fleetness, endurance, and intelligence have been the means by which the quality of the horse has been established. . . . It is a legitimate field for governmental action, to foster and promote a breed of horses whose powers and qualities are of such great value and interest to so many people. . . . Attendant upon this sport there has always been more or less of wagering upon the result of the races.—O'Rear, J., (Ky.) in 123 S. W. 681, 25 L. R. A. (N. S.) 905.

A TYPICAL CITY PARK PLAYGROUND
(Scene at Brown's Square, Rochester, N. Y.)

Municipal Promotion of Play

BY RAY L. SWIFT

PLAY is the natural method by which the young, whether of the human race or the lower animals, develop their muscles and train them to work in co-ordination with eye and brain in preparation for the more serious uses to which they are to be put with the arrival of maturity. No human being who is deprived of the playtime of childhood can possibly develop the full measure of manhood or womanhood of which it is inherently capable, and to which it is entitled. And while there may be some adult individuals who can maintain their efficiency without play, it is safe to say that this is not true of the greater number. As play has an important and necessary part in the creation of the child, so it also is important and necessary in the recreation of the adult.

With the ever-increasing complexity of society that comes with each advance in civilization, the play factor becomes more important to the physical and mental, as well as moral, well-being of the race. At the same time the condensation of population in large cities tends to cut off the facilities for play, and along with this we have permitted to grow up in our midst the evil of child labor, which, by depriving the children of a large part of their glorious playtime and placing upon their tender shoulders tasks they are not fitted to bear, we are sapping the vitality of the race and undermining the foundations of the very civilization of which we boast. But harmful child labor is rapidly becoming legally, as well as morally, criminal, and will doubtless be eradicated in time by the application of legal remedies and an increase in the sense of moral responsibility of the people. This has been called the child's century, and it bids fair to live up to the name.

But the application of negative remedies to this evil is not enough. With the growth of the city and the concurrent lessening of the play space for children and adults, affirmative measures are necessary to prevent the loss of the opportunities for play so necessary to the welfare of humanity, and it is with these measures that this article is principally concerned.

Is a Problem of the City.

In the country, the village, and small city, this problem does not exist to any great extent. There the play space is ample and supervision is unnecessary. With plenty of room and fresh air in which to play, children may be depended upon to devise means of amusement for themselves, and in doing so will develop that resourcefulness which is so necessary in after life.

But in the large cities, where land becomes so valuable that it is all used for commercial purposes, and the open spaces are so far from the congested parts as to be unavailable to a large portion of the population, the problem becomes a serious one.

How the Cities are Meeting the Problem. The Parks.

Happily, however, our cities have to a large extent realized the importance of providing breathing spaces for the people, and land has been reserved or acquired, by purchase or donation, and converted into parks in most cities of considerable size, while the nation has set aside large areas for the use and enjoyment of all the people, and various states have followed its example. These state and national playgrounds are of great value, affording, as they do, the assurance that as the other available land is pre-empted for private uses, these will remain open and free to all who are able to avail themselves of their benefits, as places where they may go during the vacation period to recuperate and answer the call of the wild, which is inherent in us all.

While the large state and national parks are of great value to the people, their usefulness is limited to a comparatively few people who have the means or leisure to go to them. They are, as a rule, beyond the reach of the great mass of the people, especially of those who need them most.

For this reason the city parks are of far greater importance. They are accessable to the whole community at the small price of a street-car fare, or the effort of a short walk, and may be used and enjoyed daily, or at least weekly, by even those of small means.

Small Parks More Important.

As the state or national park yields in importance to the city park, so does the large city park on the outskirts or beyond the limits of the city yield in importance as a source of comfort and enjoyment to those who need them most, to the little park near to the congested business centers, those oases of quiet, coolness, and restfulness in the deserts of noisy traffic, burning pavements, and bustling humanity. Perhaps at first you will be inclined to disagree with my assertion that these small and apparently insignificant parks are of greater importance than those large areas so beautifully laid out that are to be found on the outskirts of every large city. Judging from the great discrepancy in the amount of money expended by most cities on their small down-town parks, as compared with the larger ones farther out, it would seem that, in the estimation of the controlling portion of the public at least, my judgment of the relative values of the two types of parks is erroneous. But if you will go past one of these little parks on a sweltering summer evening or Sunday, and see it filled with humanity forced out from scorching streets and intolerable rooming and tenement houses, perhaps the only place where sleep is a possibility for them; or if, at other times, you watch there the daily enjoyment of the children of the neighborhood, children without yards to play in and to whom a trip to the big parks is a rare event, I believe you will agree with me that, when compared as to size and cost, the little down-town parks serve a far larger number of people and serve them more continuously, and minister to their real necessities to a greater extent, than do their more pretentious rivals on the outskirts. Let us, by all means, have a small rest park at every available point in the crowded sections of our large cities, even if to do so it is necessary to curtail, to some extent, our plans and expenditures for magnificent parks and boulevards which do not to so great an

extent minister to those who need them most.

Playgrounds.

As dirt has aptly been described as good material out of place, so we might describe crime and mischief as valuable energy applied in the wrong direction. Much of the mischief and crime among children represents good energy which, by proper direction, could as easily have been turned to good, or at least directed into harmless channels. The dictionaries define dynamics as the science of moving bodies. It takes but little observation to convince one that the problem of the child is a study of dynamics. The energy is there; the child is going to move in some direction, of that we may be sure, and all we can do is to render it easier to move in the right direction rather than in the wrong one. As this energy is most naturally expressed in play, it is an important function of the city to aid in affording to its children opportunities for healthful play.

Of course the parks afford splendid places for play for children having access to them, but their inaccessability and other limitations render them inadequate for this purpose, and has led to one of the latest ventures of the city along the line of providing for the welfare of its people, *i. e.*, the establishment of playgrounds. This is a movement which, beginning in recent years, has spread very rapidly, and now a national association is engaged in the promotion of that work.

Where parks are favorably located they are being used for this purpose, and this use should be extended. Apparatus is installed, such as swings, slides, sand piles, etc., and when sufficient room is available baseball diamonds and tennis courts. But the most available places for the establishment of playgrounds, especially for small children, are the public school grounds. These are necessarily scattered throughout the cities, so they are accessible to all the children. They are a part of the public capital, and to allow them to lie idle during three of the best outdoor play months of the year is criminal folly. Every school yard in every city in the land should be equipped and opened for the use of the children of the neighborhood during the vacation months.

In addition to the parks and school grounds, it is desirable that playgrounds for small children should be established in badly congested districts, especially those thickly settled by foreigners, and this has been done in some instances. Large areas are not necessary for this purpose. A vacant lot will answer the purpose wonderfully well, and few places there are in which they are not available. These playgrounds require efficient supervision, regular public-school teachers being usually employed for the purpose during the summer months. Such playgrounds are not only valuable in affording the children safe places to play, in place of dangerous and dirty streets, but, by taking care of them during a large portion of the day, a great burden is lifted from the mothers, who are already overworked. Especially are they boons to the mothers who are compelled by circumstances to support or aid in supporting their families. In addition they afford another point of contact by which the foreign children may become Americanized.

While the establishment of playgrounds proper is a comparatively new movement, it is proceeding with gratifying results.

For the purpose of learning something of the extent to which the municipalities are aiding in the promotion of sports and other play activities, letters of inquiry were addressed to the mayors of the larger cities of the country by the editor of CASE AND COMMENT, and, out of the thirty-seven from which replies were received, there are but few which do not mention playgrounds as important parts of their recreational activities. For instance, a copy of the municipal paper containing a description of such activities conducted by the city of Philadelphia shows that in 1910 that city conducted sixty-eight playgrounds, which drew a total attendance during the summer of over 2,000,000. Other cities report activities in proportion to their size, and from all come

A MUNICIPAL SKATING RINK

(Scene at Genesee Valley Park, Rochester, N. Y.)

assurances that they are very successful. Some few cities are just beginning the playground work, and on the whole it is apparent that, while a great deal has been accomplished along these lines, still greater developments are to be expected in the near future.

Promotion of Sports.

In addition to the playgrounds for small children, most cities have made some provision for the older boys and girls and adults. For instance in the parks of Rochester, New York, a city of 220,000 inhabitants having a park area of seven acres to every thousand of population, baseball diamonds, tennis courts, running tracks, golf links, polo grounds, and boating and swimming facilities are maintained during the summer, and skating ponds and coasting slides, with toboggans and bobs, are maintained during the winter. These are all well patronized and are successful in every way. Other cities are carrying on similar activities, and report unqualified success therein. One letter from the secretary of the board of park commissioners of Cincinnati illustrates the success of these activities so well that I take the liberty of quoting what he says concerning their ball grounds:

"Our ball grounds and athletic grounds consist of twenty-one diamonds, scattered in different portions of the city, and cause us perhaps more worry than any other portions of the park system, not because of lawsuits or fights, but from our inability to supply the demand of the different teams, and we believe that if we could add one hundred more diamonds to-day, that there would still be two applicants for each one. Our grounds are always policed, but it is very rare indeed that the officer has to do anything more than caution the 'small boy' to be less exuberant."

Too much cannot be made of this line of outdoor play. The people should be encouraged and aided in participating in these sports. They are far more important than mere spectacles for the amusement of the people. They should be extended, and steps taken to increase interest therein, if such is necessary. A few ball diamonds, like those described in the quotation above, are of far more benefit to the health and physical and moral welfare of a city, than is a big league ball ground, where thousands flock to witness professional players perform while they drink questionable iced beverages, eat peanuts and sausages, and swear at the umpire.

But the entertainments and spectacles which are held in the parks are also important. The band concerts, water carnivals, musical festivals, etc., all have

their value in getting the people out into the open, accustoming them to the use of their parks, and drawing them away from harmful diversions, and badly ventilated, disease distributing, theaters. One of the most important movements of this kind is that for a safe and sane Fourth of July, which has effected such an astonishing reduction in the deaths and injuries which were taken as a matter of course for that day a few years ago. The success of this movement does not lie wholly in securing the enactment and enforcement of restrictive ordinances, but has been brought about, largely, by making provision for the entertainment of the people in harmless ways on that day.

Legal Aspect.

As to the legal aspect of the municipal activities above described, but little need be said. The power of the city to provide parks for the enjoyment and recreation of the people is thoroughly established, and has been treated in an earlier number of this magazine.[1]

[1] 18 Case and Comment, 358.

In searching for cases involving the liability of cities for personal injuries growing out of playground activities, the writer was struck by the dearth of cases. In looking over the letters from nearly forty of the most important cities this dearth was explained. With but one or two exceptions, they reported that no suits had been commenced for accidents to those participating in games and sports provided by the city, and none have been found which have reached an appellate court. Indeed a surprising dearth of serious accidents was reported. For instance, from St. Paul we learned that they have had no serious accident in the eight years of playground work, and but few minor ones. Oakland, California, reports that, with an average monthly attendance in the playgrounds of 50,000, no law cases have arisen, and for the three years of their operation the most serious accidents have been one broken leg and two broken arms. As the general superintendent of the parks of Chicago expressed it, "This side of the matter is negligible."

Bristow and Golf

Sam Blythe, of the Saturday Evening Post, says that Senator Bristow, of Kansas, is so tall that when he plays golf he uses clubs a foot longer than those ordinarily used, and that "when he hits the ball it goes a mile, —when he hits it."

Which recalls a story told on Bristow when he first fell before the temptation to play golf. He wanted to know how the game was played. "Well, you see," said his instructor, "you put the ball right here, just this way. Now, see that mound over there about a mile and a half? Well, on that little mound there is a little hole, and the play is to put the ball into that hole in one stroke."

Bristow let drive with the same force that he had acquired in splitting rails in Kentucky, and the party followed the ball. When they came up to it they found to the surprise of everyone but the Kansas Senator, that the ball was within 3 inches of the hole.

"Now, what do you think of that!" exclaimed Bristow sorrowfully, "I missed it."—Kansas City Times.

PRESIDENT TAFT AND WALTER J. TRAVIS AT CHEVY CHASE

(By permission of the American Golfer. Copyright by Harris & Ewing.)

Linking the Links with President Taft

BY R. T. NEELY

PERHAPS it is because golf belongs to the safe and sane variety of sports that it has commended itself so highly to our present Chief Executive, and to so many other leading lights of the legal profession. Judge John W. Warrington, Governor Harmon, of Ohio, Congressman Nicholas Longworth, and Judge Howard C. Hollister are among the golfing enthusiasts of prominence whose professional and political achievements have been somewhat paralleled by their ability on the golf links. These four attorneys are mentioned from a host of others, including a number of judges of the Supreme Court, because their names, together with that of President Taft, are enrolled as charter members in the records of the Cincinnati Golf Club, one of the first organizations of the kind formed in this country.

It is seventeen years since President Taft took up the game which has since become his principal form of recreation.

In the fall of 1895 a number of Cincinnati attorneys, recently returned from their summer vacations, met in the office of Nicholas Longworth to form a golf club. William H. Taft, then judge of the sixth circuit court of appeals, was made chairman, and his brother-in-law, Will Herron, acted as secretary, of the meeting. It was on this occasion that the Cincinnati Golf Club, now one of the most flourishing of the country, was formed.

It was decided to secure an option on a piece of land belonging to the Scarborough estate, adjoining Grandin Road, and on it to lay out a golf course. Longworth undertook to lay off the nine holes, and shortly afterward the "course" was formally opened by Judge Taft and the other directors, who in turn putted a Silvertown ball into an extemporized hole formed by an inverted flowerpot, and thus initiated the links.

It would be hard to recognize the grounds as they were at that time, in the beautiful 18-hole course into which they have been transformed. The field, when its use was secured by Judge Taft and his fellow golf players, was still under partial lease to a dairyman. So it frequently happened that a player, on lifting his driver for a record shot, would barely check himself in time to keep from driving his little round projectile through the gently heaving sides of a ruminating cow, or would just graze the snout of a frightened, fugitive pig.

The first clubhouse, now used as a shelter for caddies, was a little farm hut with a chicken lean-to at the back. The whole place seemed in an almost hopeless state of delapidation, but the club fell to in earnest. At their meetings held in the Longworth offices, Judge Taft and his fellow golfers would gravely discuss such details as whitewashing the "clubhouse," dividing it up with partitions, and the like. Before very long a single shower bath was installed, whereat, to quote the club historian, Joseph Wilby, of Cincinnati, "we began to look on ourselves as nothing short of luxurious."

To-day the golf club started by President Taft owns two good clubhouses and has other appointments in splendid shape. Rarely does the President visit his home city without going over the course. Last fall the President and Governor Harmon were partners in a spirited contest, and on the occasion of his last visit before opening the campaign the President played several rounds with J. G. Schmidlapp, Cincinnati banker and philanthropist.

Although his opponent is regarded as an excellent player, and has considerably the advantage in the matter of averdupois, the President beat him roundly. For even with his handicap of weight, President Taft is an excellent golf player, on authority of no less than that of Walter J. Travis, golf champion, who played a number of games with the Chief Executive on the Myopia course at Beverly several years ago. Says the golf champion of his distinguished opponent: "Scores of golfers would sell their immortal souls to put up such a game."

According to Travis, the most striking feature of the President's game is the intensity and duration of gaze with which he addresses the ball. This, in the expert's opinion, amounts almost to a fault, because of the risk of incorrect focusing through over concentration of the retina on the ball.

The President plays with fairly long and heavy clubs. His driver and brassie are 47 inches long and weigh 14 ounces. He has made the Myopia course, regarded as particularly difficult, in 98. None of the presidential chums and classmates have been able to break or equal this record. On the contrary a good story is told of the first game played on this course by Judge Hollister and Judge Warrington. They made the first hole in 18-19, the second in 23-26, the third in 11-13, and in the fourth went quite to pieces. Judge Hollister lost six balls and his opponent seven. "At that," remarked the first-named jurist, "at that, I won out on balls."

John Hays Hammond was the President's partner in the first game he played at Myopia after he was elected to the presidency, an event, for some journalistic reason, largely featured in the newspapers and magazines at the time. They made the 6,335 yards of the course in even 109 strokes.

The much-lamented Captain Archibald Butt was President Taft's favorite companion on the golf course, and many a spectator must have stored away in his mind mental pictures of the two good friends as they appeared, intent on the jolly business of driving the hard little spheres over the windy field.

President Taft's distinguishing traits of care and conservatism are said to be stamped all over his game of golf. When he first began to play, his drive was very short, not more than 125 yards, but now he rarely tees off less than 175, and with his drive he occasionally reaches 200. The President drives with a brassie, his bag containing besides this another brassie, two mashies, a midiron, a niblick, and a putter.

At one time President Taft was an enthusiastic baseball player, and there is said to be still much of the baseball stroke in the presidential golf.

The Manx Folkmoot

A Curious Lawmaking Body of Our Own Times

BY FELIX J. KOCH

WAY back in the days when the world was young and the Peoples still lived in a state of utter democracy, government had its birth, archæologists tell us, through popular recognition of the need, in every community, of a leader or leaders. Still, the instinctive sense of justice which is with man, as with the animal, recognized the fact that those governed should have a hand in selecting their governors, and, more than that, in saying how far alone they might go. Thus there arose the ancient folkmoot. One had it, in England, since no man can say what time. To-day, however, the folkmoot of old is to be found in two places only, as among civilized peoples,—the one far up in Iceland, the other on the Isle of Man.

Not that either of these places are perhaps quite as modern as the traveler, reading the seductive literature of steamers and railways, might be led to believe. On the Isle of Man, at Douglass, one finds a miniature Atlantic City, or more nearly, an Asbury Park, but, get back into the interior, or come out of the season, when England's great middle class is not off at the island, for its holidays, and you find your Manxman still one of a primitive folk. Out in the gardens, dear old gran'dams ply the spinning wheel. At Peele the fishermen take the fish, dress, pack, and sell them, as fishermen have done in primitive lands almost since the beginning of time. They're a quaint, queer folk are the Manxmen,—but at their best at the time of the folkmoot. Only, on the Isle of Man it isn't called the folkmoot, its the Thingvall, and the site of its holding is known as the Thingvall Hill.

You who would get a taste of the beauty of Manx, leave bustling, merry, tourist-crowded Douglass behind you, and go by the picturesque island railway inland to St. John's. You'll remark, on your journey, some interesting customs; for example, each locomotive has its name, in the case of your own, now, the Fenella.

"An' why shouldn't she, zur, as much as a ship have?" the fireman responds to my query. A guard comes pushing the stock car up to the train proper; there's a cow inside, a goodly load for 'Man, and he hooks it to the rear of our passenger car, with all the caution that a Pennsylvania flagman might attend the coupling of a carload of stallions.

By and by you are speeding inland. Round about you rise, in billows, charming hills, rich with tillage. Your vis-a-vis detects you a stranger at once, and starts to tell of the island. Proud? They are as proud of their right little, tight little isle, there at 'Man, as a Californian is of what he dubs "God's country." And, of course, you seize opportunity to ask of the Thingvall.

"You be 's unlucky, zur," the man tells you, "if you're comin' this year,—for there was no laws proclaimed from the 'Hill' this July [1911]. You see, zur, 'twas Coronation year, an' the Lord King,—God save him, zur—had no time to examine them. Things must await his doing so, before they can be proclaimed." It was the only place in all Britain we had ever met that sentiment. Otherwheres the British — English, Irish, Scotch—regard the King as really having no share in the laws, merely a figurehead who represents the nation on occasions where representation by an individual is desired. In fact the Englishmen, in particular, seemed to take pride in boasting of their independence.

It was 2.35—five minutes late, of course—that we pulled into St. Johns. Instinctively, we compared the prospect with the other St. Johns, in Newfoundland. Here, on 'Man, the hamlet consisted of three temperance hotels, the exterior of each covered with stucco. By signs in the windows it was announced that they sold "tea and coffee." Having passed them, the road turned up the hill. A side street, facing on the railway, led to still another such hostelry, and then to a short row of homes. The mai road continued to the top of the slope, where it merged with a country turnpike leading, 'cross island, to Peele. On our right, 'cross the road, a pasture extended, and in this there rose the mound.

Thingvall Hill.

It reminded on first sight, for all the world, of the Indian mounds one finds in southern Ohio; then, on closer approach, as the terraces became more distinctive, of the earth works set up for supporting flagstaffs in the states.

We approached for closer inspection. Round about the base of the mound there was built a rock wall, probably 3 feet in height. Two steps served as entrance to this at one place, but these were reserved for the great and occasions of state, and a board had been drawn against plebeian comers. Inside the rock wall the terraces arose, in four steps, sod-covered, all of them. Stairs were cut into the turf, allowing of easy ascent to the top and there a flagstaff pointed skyward.

As we lingered, a man came from behind the mound proper.

"'Have your picture taken, zur?" he questioned. All summer through he remained here, taking groups on the steps of the mound, at so much per picture. He seemed almost an intruder from twentieth century ways, into this monument of bygone ages. One wanted to get away from him,—'just sit on the terrace and take in the view behind you; those lovely hills, with their patches of farm land, rolling around like the billows of sea. At one side a pretty little stone church had been erected, with the neat little, tight little manse, of stone too, at its side. Otherwise, one was right out in the country; the handful of shops here at the roadside were such as any crossroads might possess.

Two island police came ambling from the shadows of the chapel,—they were talking of the insurance bill pending in Parliament,—they had little else to do. Other Manx folk, spying a stranger, had found excuses to come out also, chatting, standing about, and watching him. They asked the police and the photographer and the first come of the shopkeepers,—did they know whence we hailed, or why here. The policemen drew near and opened hostilities.

Ceremonies at Folkmoot.

"'See you're a stranger, zur. Need a guide, zur? That's the church where they start the ceremony. The governor and the council and the Keys [their native Parliament], go in, and then the people,—as many as can find room. They hold a religious service, zur, and after that all march to the hill here, and they proclaim the laws.

"The governor and the bishop have their place on the very top, up yonder. The governor wears his military uniform, and its a grand sight indeed, sir.

"On the second row stand the twenty-four Keys,—they are the great men of the island. Then, on the third there are the clergy, about forty of 'em, I should hazard. On the bottom there's no one, these days, but the people come all about.

"When they get order and its quiet, the First Deemster of the island reads the new laws to the people.

"What's he wear? Why just as you, sir, his ordinary Sunday suit.

"It isn't near so exciting as it used to be, though. Former days, when the people didn't like a law, they showed their disapproval pretty loudly. Now, though, the laws have already been passed by the Keys and pretty thoroughly molded to meet public sentiment before doing so,—before they come here for the people to ratify, that is its seldom we get much of a disturbance these days, and fifty of us police is quite able to handle the crowd."

He was an intelligent chap, this po-

SCENES ON THE ISLE OF MAN

1—Scales and "Stone" Weight
2—The Manx Tailless Cat
3—Thingvall Hill
4—The Sergeant before the Church (Note Manx 3-legged insignia over door)
5—Manx Fisherfolk by the Sea Wall
6—Grandam at Spinning Wheel

liceman,—he might have been working, as is every state official in the United Kingdom, for a "tip," but, if so, he was worth it. We drew him out further:

"After the laws are read and get the people's approval, the crowd all go back to the church. It becomes a court, then, for transacting any business, such as ardresses to the King and the like." Mental visions of American colonists rising to make addresses to the King in the churches of New England began to float, hazily, about us. The spirit of change was creeping in,—even on the folkmoot, our new-found cicerone stated.

For example the ceremony is no longer carried on in their native language, but in English, only sections of the laws being read in Manx, by the Custodian of Peele Castle,—the ancient stronghold in the town beyond. Nor were the laws even printed in Manx any longer, for the people felt that their tongue was no longer of commercial value.

Typically Manx, this policeman diverged constantly from the main thread of discourse.

We managed to divert him back to the folkmoot. The court aforesaid remained in session until all business was done,—usually that meant at the end

of an hour,—when it adjourned to Douglass, the capital, where the regular court of the island took its place. No, banquets and the like were not held in connection with the folkmoot. Why should they be? Weren't the officers paid enough, as it was?

The Church and Surroundings.

We strolled toward the little house of worship. During the year the church was used for regular services, but its pastor was paid by the government. He and one other are designated His Majesty's chaplains, and are the only ones supported in such wise.

Evidently the American cigar we had passed him pleased this "Sergeant of the Island Police," as he had informed us was his official title. He produced the key to the church, which "he kept on his person," for visitors, otherwise, would carry everything off, he said. Did we care to visit the building? If so, he would be pleased to show us around.

We crossed the road, on our way, to see the old "Pin Fold," a rock-walled inclosure for stray cattle. Owners of such must pay 1s. 6d. if their cattle be taken from off the King's highway, and 2s. 6d. if found in a private field in the summer.

"All this broad meadow," explained the Manxman, "lying here in front of the church, is really a graveyard; 'the Christian burial ground, you'll find it called in the books. The people are buried in the bare earth, 18 inches under the surface. There's slabs of stone on the sides only, and of course, no coffins." We remembered visiting a Shaker cemetery once, where no mounds were visible, and a Trappist graveyard, where no coffins were employed. So we believed the Manx must be combining the two customs, and it interested us.

"'Do that now?" I asked, to make certain. He had used verbs of the present tense throughout.

"Oh no, zur,—no indeed, zur! That was a thousand years ago. Why, over on t'other side the road, you'll find them buried in a sitting position, and we wouldn't do that to our dead!"

Some school children of St. Johns were frolicing over the old graveyard.

He stopped to indicate another landmark. "See there, right 'cross the road from the mound, that is the Shen-Whallin."

We had him spell it for the note book. "Its the mountain down which they used to roll the witches. We use it for sheep now, though," he added.

By this time we had reached the church and were passing to a side door. Over the entry was cut the symbol of Manx, three legs, each outlifted as if to kick, but all three joined at the top. No one seems to know who originated the symbol; it refers, of course, to the island's position near the three other sections of Britain.

In the vestry he halted us before an old black Runic cross. The arm which had the circle about it was broken off and lost.

We passed from the narrow vestibule, through arched doors of wood, into the church,—while the policeman told, in his picturesque way, how, in the olden time, if a man were even a murderer, and got to this cross, it was "sanctuary," and "he could not be shot for an outlaw."

The church interior was small and immaculately whitewashed. Walking up the central aisle, pews of brown wood were at either side, a cushion of a red plush upon each. Over the seats hanging lamps were suspended, and one caught a faint odor of oil. Looking back, at the rear there was a wee balcony, where some native flags had been clustered.

Church Ceremonies at Folkmoot.

Ascending farther, two side aisles led off to right and the left. Before the pews on the right, then, there stood a long, flat-topped desk. Behind it, one long pew had a curve, and was divided into seats for the several Keys,—their speaker placed at the center. We counted twelve seats each side the aisle, while the policeman continued expressing his regrets that no robes of state were worn now at the service. Behind the Keys sat the clergy in pews square in shape. Just in front of the prelates there is an indenture, and here there are seats for the two High Bailiffs,—the chief mag-

istrates of the island. Formerly there were four men with this office.

On the left side of the church, behind this fore row of Keys the choir was seated, and there was a small organ planted squarely in their midst.

Then, at front, raised a step, one had the altar, its floor built of blocks of stone. The Bible stand was the conspicuous feature to this. On one's right, though, as you continued up the aisle toward it, there was another book stand, before a chair of heavy wood, reserved for the Governor, when representing the Crown in the court held after the religious service. Then the Bishop must sit on the Governor's right, otherwise not. Farther along, against this right wall, another series of seats were placed, seats with backs of a red cloth each, as befits the chairs of the Members of the Council. Here, again, was a place for the Governor to be seated during the religious service. His was the first of the five places, and over it was a wooden canopy.

The old laws of precedence made the arrangement interesting as it was intricate. For example, on the left, against that wall, four members of the Council had seats, while just before them was the chair of the Bishop. Then came a rail, and in front of it there were three chairs of a tawdry yellow. These were reserved for use at the table, which was brought in here, after the church service, when the house became a court.

Behind all this, an open area of stone presented, and you passed up a step to another rail, separating from a plain, red-clothed Episcopal altar, with the cross at top, and at either side a bouquet of white sweet peas. The odor of the flowers filled all the church with fragrance.

Three stained windows illumined the edifice,—flag clusters had been set between. The light filtered in, most tenderly, and there was an air of peace and quiet to all. In whispers, our guide pointed to the ceiling, it was arched and of heavy brown wood. At far rear, he said, until forty years ago, they had an organ gallery.

At the time of the folkmoot, admission to the church was by ticket, other times the place was used as any church by the town.

The Guide's Story.

"I Edward Corkill, an' it please you, sir," he added, proudly, "am warden of the church, and second of the church council, and I'm court keeper, as well, sir," the purpose of the last office being to keep, *i. e.*, care for, this building, —which is courthouse,—as well as its books and papers. Ordinary court for the district is held at Peele, and cases are slight, for there is no serious crime now. In fact sheep stealing is about the most serious offense in the category, and against it butchers of the island are required to report from whom they buy their sheep, as well as the number killed each week and to whom marketed. The government must know the number of sheep bought, who from, and who has the skin, before the meat may be sold, and if any sheep be gone, they proceed to look for it by the red mark on the skin. Varied colors are used in different localities as mark, the purpose being to know one's sheep at a distance. Some men mark only an "X" on the rump, some on the back; some add their initials. There are no shepherds here, as such, and the sheep range as they please.

As we passed out in the open, the sergeant chatted of the hunting. They get some hare on the island, he said, and occasionally, a woodcock. Fox there was none, though one might suspect it by the country. No,—no peat was dug around here; all coal, too, was brought in.

He pocketed a two-shilling piece and thanked profusely. "Here be something might interest you," he added. He led to a curious scale in a field where potatoes were weighed for sale by the Stone,—a stone being 14 pounds.

We crossed the potato field to another road in the valley, for a glimpse at a "Druid's grave,"—so he claimed. The body of the man, "dead these thousand years," was interred in the wall of the road, the stones being cemented together closely, while at the top a great boulder, cut in form of a keystone, supported another, quite flat, for roof. No, the

grave had never been opened,—they had too much respect for the dead here for that. Around it the juniper ripened, and blackberries were pinking, and a few harebells nodded their heads.

Then, as we rested, our guide talked old Manx history. He told how, when the Earl of Derby, the lord of the island, sold 'Man to the English, the people were opposed to the transfer; but they hadn't the arms or the gold to protest. Now they must pay £10,000 annually for protection by the British Army and fleet. They were only 26 miles, here, from the mainland.

Little by little we were getting back to the depot. Yonder, in a field, the man stated, an ancient urn had been found.

We passed through the diminutive village and along the road, where some tourists came driving from Douglass to Peele. On another hill, to the far left of the Thingvall, there was a small tower, clear-cut 'gainst the sky,—it marked the grave of a family who did not wish to be buried in sacred ground, and so were interred up there.

The day was delightful, and it had grown warm now. Some children came offering mineral water from their stand, in a meadow, which the tourists must pass. We "stood treat," and, refreshed. Sergeant Corkill showed us another mountain, in the distance, off behind the church, at whose foot Hall Caine, the novelist,—disliked of all Manxmen,—resides.

Woman Suffrage.

There were still a few moments 'till train time. Wouldn't we like a taste of their stout? Not far from the depot there was a taproom, where you got the great English beverage for a "trippence," 6 cents. There some idlers were discussing woman suffrage in England, already the question had grown acute. On 'Man, no woman could vote unless she owned property, and that meant, most often, a widow to whom such had been left. When a girl is married the property is considered her husband's whether in her own right before that or no. But, if she is maiden or widow and has a holding, even if it be but a small cottage, renting at £4 the year,—she is entitled to vote. On the other hand,—and here rose the argument as to justice,—no matter how many such cottages she might own, she received but one vote in any one district. Let her have property in different districts of the island, and she received one vote in each of these. Election time was indeed an exciting time on the island, and conveyances, even to automobiles, were sent for the ill, if it was at all possible to bring them to vote. The party the man voted for pays one half the expense of this transportation, the government the other half,—in the event of successful candidates. Where a man is not elected he pays,—or his party pays,—the expenses of bringing his voters.

We left them to settle it for themselves, for the train was coming. At 4 we must leave here for Peele and beyond.

"You'll be back some time for the folkmoot, won't you?" called the sergeant, and we promised, but we doubt if he caught our answer above the wheeze and groan of the train.

Editorial Comment

Reason's whole pleasure, all the joys of sense,
Lie in three words,—health, peace and competence.
—*Pope*

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¶ EDITORIAL POLICY.—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell.

National Health.

MR. Lloyd George, Chancellor of the Exchequer, in a remarkable address delivered at Birmingham a few months ago, discussed the national insurance bill, and took occasion to express advanced views as to future legislation.

In referring to preventable disease, especially tuberculosis, which he asserted was responsible for 80,000 deaths annually, Mr. George stated:

"As a rule, it is the worker who is attacked. As one man said: It rarely attacks a man who pays income tax. I do not suggest that as a remedy. But you have industries in Birmingham and in the surrounding district which are peculiarly liable to it,—your brass working, some of your iron working. Go to Sheffield,—your cutlery, file making. These trades are peculiarly liable. Now, a man clings to his work as long as he can, because he knows if he gives it up there will be no one to provide for his family.

"What do we do in the bill? We open a new prospect for that worker. We plant all over Britain cities of refuge to which we can flee from this avenger of life. We are setting a million and a half aside for the purpose of building sanatoria throughout the country. There will be a million for maintaining them. The worker now will be able to command medical attendance. He will discover the disease in time. He will be taken to these institutions in a few months. The bulk of the cases that are taken in time are cured. He will be restored to his health, restored to his workshop, a fit, capable citizen, instead of being a wreck.

"Now, that is one thing that we are doing. What next? We have a provision for maternity,—an allowance of 30*s*., which, I think, is one of the most valuable provisions of the bill, and we are going to see that the money is spent for the purpose for which it is designed, in spite of one or two protests we have had from friendly societies. The money is meant for the mother,—to help her in discharging the sacred function of motherhood by proper treatment and fair play, so as to put an end to this disgraceful infantile mortality which we have got in this country.

"What else have we got? It is no use sending men to sanatoria, it is no use even giving them free doctoring, unless you relieve them from anxiety about their households. So we are making provision for the maintenance of the family during the time a man is under the doctor's hands, when he is fighting his struggle with the angel of death. We look after his children for him. Let him

have both hands free to fight with the help of a doctor, and he will pull through.

"The allowance we are making is not a sumptuous one to begin with, but it will grow. It will grow without a single addition or charge upon employer or employed. One of the advantages of our scheme is that it will expand, it will fructify, it will bear more fruit. This is the beginning,—and the beginning of a good deal more before we have done. We are not done with fighting poverty and misery in this land."

The owners of unsanitary property constituting a menace to the health of the community were dealt with in this unsparing fashion:

"There is no city or town—nay, not a village—but you have got the reek of insanitary property. I want to see the law protecting property . Yes, but I also want to see it protecting the worker's home. I would treat the man who received rents or ground rents, from insanitary dwellings which kill little children, I would treat him as I would treat the receiver of stolen property."

One can imagine the sensation that similar statements would cause, if made by a statesman of equal importance on this side of the Atlantic. Probably not one of our political leaders would be willing to stand sponsor for so paternalistic a program.

But much is being accomplished here in a quiet, effective, unheralded way. Science and common sense are being applied to local conditions, with the result that municipal-health bodies, charitable organizations, medical colleges, and physicians are all working harmoniously to make the United States a healthy and strong nation.

Reports from all over the country indicate that the popular crusades to reduce infant mortality, the death rate from tuberculosis, typhoid fever, pneumonia, and other diseases, are producing splendid results in proportion to the millions of dollars annually expended for health work.

Not for years have the people shown such interest in matters pertaining to public health.

Many states are enacting progressive health laws, and the bond of sympathy between the doctors and the public is growing closer yearly. The death knell of the common drinking cup and roller towel has already been sounded in a number of states, and the cupless drinking fountain is being gradually placed in public places and schools.

Care of the backward child, the imbecile pauper, and other sociological problems are receiving more attention, and such necessary work as the general inspection of school children and visiting nurses in the public schools gradually is being taken up in every large city and many smaller communities.

The people are aggressively determined to preserve our national resources of every description, and among them to place first the care of human life. Never before was so much attention paid to athletics and all forms of manly sport. Never before was the gospel of play preached so effectively. The old Grecian ideals are coming again into vogue. We are looking forward to a race of men and women who will walk the earth with a sense of conscious power. And best of all, we may found a civilization rivalling in splendor the age of Pericles, upon resources drawn from the labor of machines, rather than from the unrequited toil of miserable Helots.

Back to the Land.

THIS familiar and pointed advice has recently been offered to the legal profession, and especially to those young men who, after years of study, stand upon its threshold.

In his sixth annual report (1911) as president of the Carnegie Foundation for the Advancement of Teaching, Dr. Henry S. Pritchett says: "1,700 graduates annually from the law schools would be sufficient to maintain even the present crowded stage of the legal profession. As a matter of fact, in June, 1910, the number of students graduated by the law schools numbered 4,183; and this takes no account of the large percentage of lawyers who are admitted to the bar without having received a law-school diploma. If we place the *per capita* need of a lawyer at the same figure as the need of a physician, and

disregard all who enter the profession without completing successfully a law-school course, it is evident that the output of the law schools of the present day is far in excess of any necessary demand. It is certain that the demand for lawyers and physicians is much more than met by the professional schools to-day. It is equally certain that the demand for educated farmers is strikingly neglected."

According to Benno Lewinson, chairman of the membership committee of the New York County Lawyers' Association, 70 per cent of the 16,000 lawyers in greater New York live on the verge of starvation, with an income of not more than $3 a day.

"The trouble is overcrowding," says Mr. Lewinson. "If there were only 6,000 instead of 16,000 their chances of success would be very fair,—almost good." He urges young men not to aspire to the bar. What, then, would he advise brainy, ambitious young men to do? Listen: "I consider that the best opportunity, from a financial standpoint, that the young man of to-day has is scientific farming. If he would educate himself for that, he could make himself and his family comfortable, and it would not take him so very long to do it."

In similar vein the Secretary of Agriculture recently stated: "As we read the daily papers and see the reports of the thousands of young men who are graduated in law throughout the country, the reflection naturally comes, what a pity that the great demand of the farm for intelligent men is not being more considered by our educational institutions. There is not law work for more than a small per cent of these young men. No doubt the education and mental training they have had will make them brighter men, but there are no jobs waiting for them, that is for more than a very small percentage of them, while the fields are crying aloud for trained men. . . . It might be wise to consider about how many young lawyers will be needed in the next year to take the place of the older men who are dropping out. That could be very easily determined. Then if the attention of this class of students were called to the demand of the industries for educated men, a different direction might be given to many young men who seem to be 'drawing their bows at a venture.' "

This is a situation that may well be trusted to remedy itself. In law, as in every other pursuit, there is intense competition, and the primeval law of the "survival of the fittest" is potent. Those whose choice of the profession was based upon a misconception of the requirements essential to success will gradually withdraw into other pursuits. In no other calling is the "winnowing" process more active. The result is a bar which has never had its superior in the world.

Agriculture is a noble occupation. It has great possibilities. Scientific farming is certain to replace the crude and slipshod methods heretofore prevailing. Intensive cultivation will become a fascinating occupation. Farm and city will become more closely united. There will constantly be less of drudgery and isolation in the farmer's life. But these advantages and pursuits are for those to whom they appeal. Let no young man who has a decided talent for the law, hold back. If the call of the law is in his blood—if he is willing to labor and endure and pay the price of professional excellence—he would be false to himself and to his destiny if he failed to answer the mystic summons. Better for him the midnight oil and the keen contests of the forum, than rustic quiet or fat beeves.

Procedural Reform.

THE reforms in law procedure which have often been advocated in our columns are embodied in bills recommended by the American Bar Association at its meeting last August, and now before Congress. One of these bills provides that judgment shall be given upon the merits, without regard to technical errors which do not affect the merits. This has been reported favorably in both Houses, but has not been acted upon.

A bill providing that equitable defenses may be set up in actions at law,

and that a suitor shall not be dismissed because his action is brought at law when it should have been brought in equity, or *vice versa*, has passed the Senate and is now before the House.

A bill permitting a review in the Supreme Court of decisions of the highest court in a state, when the judgment is against the validity of an act of the state legislature, has also passed the Senate, and is now before the House. Had this bill become a law before the decision in the Ives Case, it would have allowed a review of that unfortunate decision, by the Supreme Court of the United States.

These bills, if passed, will do much to remove the defects in our legal procedure, which have caused so much criticism,—more or less exaggerated, it is true, but having very solid foundation in fact.

Tentative Penal Law.

DR. J. H. Stolper, the public defender of the state of Oklahoma, has prepared a tentative penal law, establishing a system of adult probation and creating a court of rehabilitation to have exclusive jurisdiction over all matters pertaining thereto.

The proposed act empowers trial judges to suspend sentence upon first offenders convicted of a misdemeanor, and to transfer the case to the jurisdiction of the court of rehabilitation. The order transferring the case may provide for the payment of a fine and costs, and may direct the probationer to make restitution to the party injured by him. The court of rehabilitation is required to issue to the probationer a certificate reciting all the conditions upon which the probationer has been placed on probation, where, when, and how the probationer shall report, and in what part of the state he shall reside. The probationary period is to be not less than the period of imprisonment prescribed by law for the offense of which the probationer was convicted.

The benefits of the act are also to be extended to every convict confined in penal institutions who shall earn such privilege under the merit system. This provides for one mark of merit for each day of good and perfect conduct, and one mark for every day of diligent work, a third mark being added as a reward for earning two marks during the same day. Special marks are provided for in case of sickness or for the performance of acts of valor.

A prisoner credited with a number of merit marks which, multiplied by four, shall equal in hours one third of the time which the prisoner has been sentenced to serve, is eligible to be admitted to probation. A prisoner undergoing punishment for violation of the rules of the penal institution where he is confined loses from his earned merit marks, three merit marks for every week day, and one merit mark for every holiday, subject to an appeal to the court of rehabilitation, if he claims to have been unjustly or excessively punished.

Any violation of the probation conditions by any probationer automatically causes the revocation of the probation certificate, and makes it the duty of the court of rehabilitation to issue a warrant for the immediate arrest of the probationer. But if any probationer fully complies with all the terms of his probation certificate, he is entitled, as a matter of right, after a hearing, to a decree of discharge, which shall be a full satisfaction of the original judgment. Any discharged probationer who for three years leads a good and honest life may apply for a certificate of rehabilitation, which will completely restore him to his civil and citizenship rights.

The object of the act is to help those unfortunates who, either through faulty heredity, bad environment, or bad social conditions, have unfortunately become social outcasts, although not yet criminals at heart, and who may be reclaimed to good citizenship if dealt with justly and kindly.

Dr. Stolper invites criticism of his proposed law, from members of the legal profession. He states that some of its features cannot be made effective without amending the Oklahoma Constitution, but believes that this may be readily accomplished.

This probationary scheme has been carefully thought out, and seems to be one of the best systems yet devised.

Correspondence

Sentence of Death on Plea of Guilty.

Editor CASE AND COMMENT:—

In your July issue T. L. Jeffords speaks of the case of Commonwealth v. Richeson as the first instance of a man pleading guilty to a capital offense, and being executed on that plea without a trial.

I beg leave to call his attention to the case of Edward W. Green vs. Commonwealth, reported in 12 Allen, 155 (Mass.). This case was thoroughly argued by eminent counsel. The opinion was rendered by Chief Justice Bigelow in the January term, 1866.

It is well worth reading for its display of learning, law, and logic. The sentence of death upon Green's plea of guilty in the first degree was held to be without error.

JOHN J. WALSH.

Boston, Mass.

Editor CASE & COMMENT:—

I note in your July number under "Correspondence" the article of T. L. Jeffords concerning the execution of Richeson.

I am too far from Massachusetts to be very familiar with the facts, but so far as I learned from newspaper articles, Richeson was a brilliant preacher, and no question had been raised prior to the homicide as to the sanity of Richeson, and after the homicide there was practically nothing to suggest insanity except the homicide itself. If I am correct in this, the possibility of insanity in the Richeson case exists in every case, and many men have been executed pursuant to a plea of guilty.

I have an impression that the court ordered some sort of judicial inquiry as to the mental condition of Richeson prior to his sentence, or possibly it was the governor after sentence, and I seriously doubt if the commonwealth of Massachusetts is subject to criticism after the offhand manner of your correspondent.

CLARENCE C. COE.

Barron, Wis.

Editor CASE AND COMMENT:—

In the July issue of CASE AND COMMENT there appears a letter from T. L. Jeffords, of Harpers Ferry, West Virginia, with reference to the execution of Richeson by the Commonwealth of Massachusetts without trial, the court having accepted the defendant's plea of guilty as indicted. Your correspondent asks for information as to other cases of homicide where the same course has been pursued. When Richeson's plea of guilty was accepted, and he was sentenced by the court to be executed, I took occasion to examine into the question, somewhat, as I found that there was quite a general impression among lawyers that a plea of guilty to an indictment for murder in the first degree was never accepted.

In the absence of a statutory provision to the contrary, defendant, even in a capital case, has a right to plead guilty, and the court must accept the plea and pronounce the proper judgment and sentence. In some states, however, it is otherwise by statute in capital cases, and such a statute is valid. 12 Cyc. 352.

The first case that I can find in this commonwealth is that of Com. v. Battis reported in 1 Mass. 95.

"The defendant, John Battis, a negro of about twenty years of age, was indicted for the murder of one Salome Talbot, a white girl of the age of thirteen years, on the twenty-eighth day of June last [1804]. The indictment contained three counts.

"The 1st count charged the killing to have been with a stone, with which he beat and broke her skull, etc. The 2d stated that the killing was by drowning; and the 3d charged the killing to have been by beating and breaking her skull with a stone, and throwing her body into the water, and suffocating and drowning.

"There was another indictment against the prisoner for committing a rape on the body of the said Salome, on the same day on which the murder was charged to have been committed.

"On the second day of the term, in the forenoon, the prisoner was set to the bar, and had both indictments read to him, and pleaded guilty to each.

"The court informed him of the consequence of his plea, and that he was under no legal or moral obligation to plead guilty; but that he had a right to deny the several charges, and put the government to the proof of them. He would not retract his pleas; whereupon the court told him that they would allow him a reasonable time to consider of what had been said to him, and remanded him to prison. They directed the clerk not to record his pleas, at present.

"In the afternoon of the same day the prisoner was again set to the bar, and the indictment for murder was once more read to him; he again pleaded guilty. Upon which the court examined, under oath, the sheriff, the jailer, and the justice (before whom the examination of the prisoner was had previous to his commitment), as to the sanity of the prisoner; and whether there had not been tampering with him, either by promises, persuasions, or hopes of pardon, if he would plead guilty On a very full inquiry, nothing of that kind appearing, the prisoner was again remanded, and the clerk directed to record the plea on both indictments.

"On the last day of the term, the prisoner

was brought to the bar, and the attorney general (Sullivan) moved for sentence; which the chief justice delivered in a solemn, affecting, and impressive address to the prisoner.

"The sentence was entered on the indictment for the rape. He has since been executed."

In the case of Green v. Com. 12 Allen, 155, the question of accepting a plea of guilty was gone into very fully by the court in an able and exhaustive opinion by Chief Justice Bigelow. Green was indicted for murder, and, according to the record in the case, pleaded guilty to murder in the first degree, and was sentenced to be hanged. Among the causes of error was the following, which is the only one especially interesting so far as this matter is concerned.

1. That this court had no power to enter judgment and award sentence of death against the defendant upon his plea, without the intervention of a jury.

The following is quoted from the court's opinion, and is illuminating as showing the attitude of the courts of this commonwealth with reference to this question:

"It is the well-settled practice in all courts where the common law is administered, to receive and record with great reluctance and caution a confession of guilt in a capital cause. But a court has no power absolutely to refuse such plea. It will, however, always take care to see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of the nature and effect of the plea and of the facts on which it is founded, before proceeding to make it the foundation of a judgment. Such was the course, as we are informed by our associate, Mr. Justice Hoar, before whom these proceedings were had, which was adopted in this case. The prisoner was attended by learned, experienced, and able counsel, with whom he had advised before he was set to the bar. Before his arraignment and before his plea and confession were finally received and entered, the nature of murder in the first degree and the facts necessary to sustain the charge were fully explained to him by the court, and he was advised before making his plea to consult with his counsel. After such explanation and advice he was allowed to retire from the court room with his counsel for the purpose of consultation, and, after an absence and conference with them for a considerable period of time, he returned and entered the plea, which the record shows was received and recorded. These statements do not serve to show that the record is rightly made up or that the plea is valid, but they do answer any implication arising from the suggestions of the counsel for the petitioner that the plea in the present case was founded on mistake or misapprehension of the facts, or of the nature of the crime of murder in the first degree, or the punishment affixed to it, on the part of the petitioner, or that the plea was entered by him unadvisedly or received by the court without due precautions to guard against error.

"We have now gone over all the causes of error assigned in support of the petition, and fully considered the arguments urged in their support. For the reasons already stated, we are of the opinion that the record discloses no error, and that the judgment and sentence were in due form and in all respects legal and valid.

"It would certainly be a matter of great regret if, in a case of this nature, it should be supposed that there was any doubt or difference of opinion among the members of the court on the questions upon which we have been called to pass. I therefore deem it proper to add that in our deliberations upon them we have been aided by our junior associate, Mr. Justice Colt, who was present at the argument, but who did not join in the opinion given to the governor and council in October, 1864, he not having been then one of the justices of this court; and that in the conclusions which I have stated the court unanimously concur.

"The result is, that the prayer of the petitioner is denied.

"The prisoner was accordingly hung."

I understand that in the Richeson Case all the formalities were observed, and that every precaution was taken by the court to ascertain whether or not the plea of guilty was made by a person competent to make it, and was made voluntarily and with a full understanding of the consequences, and that Richeson's able counsel, who were in court, were asked if they knew of any reason why the plea should not be accepted by the court

I would also call your attention to the case of Pope v. State, 56 Fla. 81, 47 So 487, annotated in 16 Ann. Cas. 972, for a further discussion of this subject, and also when and under what circumstances a plea of guilty can be withdrawn.

In conclusion let me quote Chief Justice Bigelow in the Green Case: "It certainly would be an anomaly in a court where the rules of the common law are administered to impanel a jury for the purpose of trying a fact which is not only not denied, but is expressly admitted. The essential idea involved in a trial by jury is that there is an issue between the parties to the record. But there can be no such issue where one party affirms a fact and the other party admits it to be true. In such a case there is nothing on which a jury is to pass."

JOSIAH S. DEAN.

Boston, Mass.

Among the New Decisions

"The law has not fixed a day when the precedents of its adaptation to the mutability of human affairs shall be no longer in force."
—Charles Doe

Attachment — implied contract — destruction of property. That no contract to pay for animals negligently driven in the way of a railroad train and killed can be implied so as to bring a demand for compensation within a statute allowing attachments in case of breach of contract, express or implied, is held in Kyle v. Chester, 42 Mont. 522, 113 Pac. 749, annotated in 37 L.R.A.(N.S.) 230.

Attorney — lien on judgment — effect of assignment. Under a statute giving an attorney a lien on the judgment from the time of filing notice thereof, an assignment of the judgment in good faith and without collusion, before the lien is filed, is held in the Washington case of Humptulips Driving Co. v. Burrows, 118 Pac. 827, to free the judgment from liability to the lien.

The weight of opinion as disclosed by the note accompanying this case in 37 L.R.A.(N.S.) 226, seems to be that a lien for services of an attorney on a judgment obtained by his labor and skill will not be defeated by a subsequent assignment of the judgment, though in some jurisdictions his right thereto is dependent upon compliance with statutory provisions as to entry on record, or filing of notice with the clerk.

Bankruptcy — exempt property — privileged judgment. The entry and docketing of a judgment against a bankrupt, pending the bankruptcy proceedings, and before the discharge of the bankrupt, is held in Gregory Co. v. Cale, 115 Minn. 508, 133 N. H. 75, to be a valid lien upon real property of the bankrupt, which, by reason of the homestead exemption at the time of the adjudication in bankruptcy, did not pass to the bankrupt estate, but which was liable to the payment of the debt represented by the judgment, because not a part of the homestead when the debt was created; the homestead exemption having been enlarged by statute subsequent to the creation of the debt.

The note appended to this decision in 37 L.R.A.(N.S.) 156, presents the cases dealing with the question whether a judgment rendered after the exemption laws attach to property, upon a debt contracted previously, operates as a lien upon the property.

Carrier — exemption from liability — statutory prohibition. A statute providing that a common carrier cannot be exonerated by an agreement made in anticipation thereof, from liability for gross negligence, is held in Walther v. Southern P. Co. 159 Cal. 769, 116 Pac. 51, not to apply in favor of passengers who are carried without consideration.

The case law pertaining to the validity of a stipulation in a pass limiting a carrier's liability is collated in the note appended to this decision in 37 L.R.A. (N.S.) 235.

Carriers — duty to inform passenger of intention to return. A railroad company which, for purposes of its own, runs a passenger train beyond a station where passengers are to alight, into its yards, is held bound in the Mississippi case of Natchez, C. & M. R. Co. v. Lambert, 54 So. 836, to inform them of its intention to return and give them an opportunity to alight at the station, and is liable for all damages proximately caused to them by its failure so to do.

The decisions relating to the duty of a carrier in this regard are collected in the note appended to the above case in 37 L.R.A.(N.S.) 264.

Contracts — printed signature — effect. The printing of the name of the vender at the beginning, in the body, and on the back of a merchant's order blanks, to be filled up by a soliciting agent, is held in Lee v. Vaughan Seed Store, 37 L.R.A. (N.S.) 352, not a sufficient signature to satisfy the statute of frauds.

Contract — voting contest — withdrawal. A question which seems to have been considered by the courts but once before was presented in Mooney v. Daily News Co. 116 Minn. 212, 133 N. W. 573, 37 L.R.A.(N.S.) 183, holding that an offer of special compensation to one receiving the largest number of votes based on paid subscriptions to a newspaper, after acceptance and part performance of the terms of the offer, becomes an executory contract between the person making and the person so accepting the terms of the offer; and the former is bound by its terms after such acceptance, and cannot, without the consent of the latter, either change the terms of the offer, or give to them an interpretation contrary to their true meaning.

Contract — to defraud creditors — pari delicto — attorney and client. An attorney in whose name his client has placed property for the purpose of defrauding the creditors of the client is held in Lindsley v. Caldwell, 234 Mo. 498, 137 S. W. 983, not entitled to refuse to comply with his agreement to return it, on the theory that the parties being *in pari delicto*, equity will leave them where it finds them.

As appears by the note appended to this decision in 37 L.R.A.(N.S.) 161, the cases upon this question, while few in number, are uniform to the effect that the parties are not regarded as being *in pari delicto*, and the client is permitted to recover, notwithstanding the illegality of the conveyance, if no rights of innocent purchasers have intervened.

Deed — blanks — intrusting to agent — misapplication — effect. Where the owner of real estate executes and acknowledges a deed thereto, leaving the name of the grantee blank, and intrusts it to another, with authority to negotiate a sale of the land, fill in the name of the buyer, and deliver the deed upon certain conditions, and the holder of the deed, in violation of his instructions, delivers it to a third person, who fills in his own name and records the deed, an innocent purchaser of the property upon the faith of the record is held in Guthrie v. Field, 85 Kan. 58, 116 Pac. 217, annotated in 37 L.R.A.(N.S.) 326, to acquire such a right that his claim of title cannot be adjudged void at the suit of the original owner, without compensation being made for what he has lost by the transaction.

Evidence — extra-judicial confession of stranger. That an extra-judicial confession not under oath, by a stranger who cannot be produced as a witness, is not admissible at the trial of an indictment for murder, is held in the Mississippi case of Brown v. State, 55 So. 961, annotated in 37 L.R.A.(N.S.) 345, where the considerable number of cases dealing with the question are collated and discussed.

Evidence — dying declaration — impeachment. Evidence of inconsistent statements made by one after receiving a mortal wound is held in the Colorado case of Salas v. People, 118 Pac. 992, to be admissible to impeach his dying declaration in a prosecution of one who is alleged to have inflicted the wound, although no foundation has been laid for it.

The recent decisions as to the admissi-

bility of contradictory statements by a declarant to impeach his dying declarations are gathered in the note accompanying the foregoing case in 37 L.R.A. (N. S.) 252, the earlier decisions having been discussed in a note in 56 L.R.A. 441.

Homicide — shooting bystander. That one hitting a bystander when shooting at another with intent to kill the latter may be convicted therefor, under a statute providing for the punishment of whoever shall shoot any person with a dangerous weapon with intent to commit murder, is held in State v. Thomas, 127 La. 576, 53 So. 868, which is accompanied in 37 L.R.A.(N.S.) 172, by a note collating the case law dealing with the subject of assault with intent to murder or kill by unlawful act aimed at another than the one injured.

Husband and wife — separate property — power of legislature. A novel question involving the power of the legislature to change increment or income of separate property from community property to separate property, was presented in Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L.R.A.(N.S.) 186, holding that the existence at the time of marriage of a statute providing that the rents, profits, interest, or proceeds of separate property, accruing during marriage, shall be common property, does not prevent the legislature from restoring all increments of separate property accruing after the passage of the repealing statute, to separate use.

Limitation of actions — payment by principal — effect upon sureties. That payments on account by one who has given bond with sureties to secure money lent him by a school district, before the limitation period has expired, will toll the statute as against the sureties, is held in the Missouri case of Clinton County v. Smith, 141 S. W. 1091, accompanied in 37 L.R.A.(N.S.) 272, by a note discussing the cases relating to payment or promise by a principal as extending the limitation period as to the surety.

Municipal corporation — automobile — forbidding operation by children. Charter authority to license and regulate hackmen, draymen, drivers, and all others pursuing like occupations, is held in the Texas case of Ex parte Epperson, 134 S. W. 685, annotated in 37 L.R.A. (N.S.) 303, not to empower a municipality to forbid children under a specified age to operate automobiles on its streets.

Note — gratuity — right to compel refund of proceeds. One who voluntarily and with full knowledge of absence of indebtedness gives another his note is held in Dickinson v. Carroll, 21 N. D. 271, 130 N. W. 829, not entitled to compel him to refund what the maker is compelled to pay thereon to a bona fide holder for value, without notice.

This is apparently a case of first impression upon the question.

Office — deputy sheriff — rival candidate. The appointment by a sheriff as his deputy of one who withdrew from candidacy for the nomination in consideration of the promise of a deputyship is held in Com. ex rel. Layman v. Sheeran, 145 Ky. 361, 140 S. W. 568, annotated in 37 L.R.A.(N.S.) 289, not obnoxious to a statute forbidding the sale or letting to farm or deputation of any office.

As far as actual decisions upon this point go, the weight of authority is to the effect that an agreement in consideration of the withdrawal of candidacy for office is void as against public policy; and it matters not whether it is a withdrawal from the race for nomination, or, after nomination, from the race for election.

There seems to be no reference in the foregoing decision to public policy.

Payment — check — collection by agent. In an action to recover the price of goods sold and delivered, it is held in McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542, to be a valid defense that the purchaser theretofore gave his check payable to the seller's order to an agent of the latter, authorized to receive the same, but who, having no authority so to do, indorsed the seller's name by himself as agent, and cashed the check at the bank on which it was drawn, the bank

charging the drawer's account with the amount of the check and returning it to him stamped "Paid."

The question of the validity of a check as payment of a debt, where the drawee pays it to an unauthorized person, does not seem to have been often decided. The cases pertaining to the subject are gathered in the note accompanying the foregoing decision in 37 L.R.A.(N.S.) 201.

Process — publication — affidavit — sufficiency. An affidavit is held in Grigsby v. Wopschall, 25 S. D. 564, 127 N. W. 605, to be insufficient to support a service of process by publication, which merely shows inquiry of a few persons as to the whereabouts of defendant, without getting information concerning him, and placing the summons for service in the hands of two sheriffs whose returns show inability to find him after inquiry of certain public officials, without showing any attempt to find relatives or neighbors of defendant from whom information might be obtained.

The cases dealing with the character of the inquiry as to the whereabouts of a party necessary to sustain constructive service of process are gathered in the note accompanying the foregoing decision in 37 L.R.A.(N.S.) 206.

Replevin — individual interest in personalty. The general rule is well settled that replevin will not lie for an individual interest in personal property. Such is the holding in McDonald v. Bailey, 25 Okla. 849, 107 Pac. 523, accompanied in 37 L.R.A.(N.S.) 267, by a note in which the case law pertaining to the subject is collated.

Shipping — Duty to follow short route. An ocean carrier is held in the Washington case of H. S. Emerson Co. v. Reunis, 118 Pac. 631, not liable for injury to freight due to the steamer to which the property is delivered for transportation following its usual route to the port of destination, although there is a short route, by following which the injury might have been prevented.

The general question of a carrier's duty with respect to the route to be followed is discussed in the note appended to the foregoing case in 37 L.R.A.(N.S.) 222.

Strike — right — unequal system. A labor union is held in Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036, to have a right to strike against the recognition in a shop of a system of piecework which allows workers to employ helpers, the effect of which is, in times of slack work, to deprive those not employing helpers of continuous work, although success may result in throwing out of employment those who have been employed merely at will as helpers, and injure the employer.

The question whether an attempt to compel an employer to adopt or change some system in his method of employment or work is a justification for a strike has seldom been raised. The few cases which have considered the subject are referred to in the note accompanying the foregoing decision in 37 L.R.A.(N.S.) 179.

Trade — unfair competition — copying design. The placing upon the market of a stove the design of which is copied from that of a rival manufacturer is held in Rathbone, Sand & Co. v. Champion Steel Range Co. 110 C. C. A. 596, 189 Fed. 26, annotated in 37 L.R.A. (N.S.) 258, not to constitute unfair competition warranting injunctive relief, if the earlier design had been so recently produced that the public had not become familiar with it as designating the product of the designer, so as to be deceived into buying the copy as his, where the copyist uses his own name and trademark on his product, so that there is no attempt to palm it off as that of his rival.

Water — percolating — withdrawal — interference with surface support — liability. That no action lies for withdrawing percolating water from under the surface of a parcel of real estate, in the construction of a tunnel of a railroad under an adjoining street the fee of which is in the public, although the result is a consolidation of the earth, which causes a settlement and cracking of the walls of buildings thereon, is held in New York

Continental Jewell Filtration Co. v. Jones, 37 App. D. C. 511, 37 L.R.A. (N.S.) 193.

While the earlier decisions laid down the general rule of absolute rights in such water, the great majority of the recent cases have receded from that view, and favor the doctrine of confining each landowner to a reasonable use of the water. This being so, it is clear that the foregoing case is out of line with the modern authorities in invoking, as it does, the doctrine of absolute rights.

Water — right of state to divert. The right of a state to use the bed and waters of a river for the improvement of navigation is held in Fulton Light, Heat & Power Co. v. State, 200 N. Y. 400, 94 N. E. 199, not to extend to the diverting of the waters from the river to an artificial channel along the bank, constructed not for the improvement of the navigation of the river, but as a separate navigable water way, and if it attempts to do so, it must make compensation to the riparian owner for the injury thereby caused him.

As appears by the note accompanying this case in 37 L.R.A.(N.S.) 307, owing to the conflict among the authorities and the different premises upon which the decisions are predicated, it is difficult to state a comprehensive general rule or rules by which this class of cases is governed, except to say in the most general way that where the title to the bed of the stream is in the riparian proprietor, any diversion of the waters thereof for public use constitutes a taking which requires compensation; and that where the title to the stream, including its bed, is in the state, the weight of authority is to the effect that, for some public purposes, at least, such waters may be diverted without liability to a riparian owner thereby deprived of the normal flow of the stream. Since at common law the title to the beds and waters of all nontidal streams was in the riparian owners, all cases permitting the public to remove the waters from such streams without compensating riparian owners are departures from the rule as originally established.

Will — destruction of revocatory will — effect. That the destruction of a will which expressly revoked a prior one, which had been retained in existence, will revive the prior one, if such was the intent of the testator found by the jury from all the circumstances of the case, is held in the Iowa case of Blackett v. Ziegler, 133 N. W. 901, annotated in 37 L.R.A.(N.S.) 291, where the recent cases upon the question are referred to, the earlier decisions having been gathered in 37 L.R.A. 575 and 14 L.R.A. (N.S.) 937.

Recent English and Canadian Decisions

Adverse possession — abandonment by former owner. The mere building of an inclosing wall which leaves uninclosed a narrow strip of land between such wall and the known and ascertained boundary of the builder's land does not amount to such an abandonment or discontinuance of possession as to give the adjoining owner a basis for asserting the acquisition of title thereto by adverse possession. Knyoch v. Rowlands [1912] 1 Ch. 527.

Bonds — fidelity of servant — nondisclosure of servant's previous dishonesty. The English court of appeal in London General Omnibus Co. v. Holloway [1912] 2 K. B. 72, holds that where the employer of a servant when taking a fidelity bond did not disclose to the surety the fact, known to the employer but not known to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer cannot enforce the bond against the surety in respect of the subsequent dishonesty of the servant, although the nondisclosure by the employer of the previous dishonesty of the servant was not fraudulent; such dishonesty being an intrinsic rather than an extrinsic circumstance.

Composition with creditors — advance of

funds to pay — transfer of securities — preference. An agreement by which a bank made an advance to an insolvent customer, of the amount of the composition with his creditors, in consideration of an absolute transfer to it of securities already held as collateral, and of his note for the surplus of his secured indebtedness to it, after payment of the composition, was held in Philie v. Coté, Rap. Jud. Quebec 21 B. R. 128, not to amount to an undue preference, and to be valid and binding as between the parties thereto.

Contempt — procuring warrant from one court after refusal in another. Procurement of a warrant for arrest from a criminal court, unless tainted by fraud, is not a contempt of the civil court which had previously refused to grant it. Re Taylor [1912] A. C. 347.

Contracts — validity — agreement not to compete. A covenant on the part of one selling his shares in a corporation that he will not "engage in, carry on, be interested in, have money invested in, or hold shares in, any business similar to or in competition with the business carried on by the said company" in a certain locality for a period of five years, was held in Kelly v. McLaughlin, 21 Manitoba L. Rep. 789, to have reference only to the line of business then carried on by the corporation, and not to other lines of business within its corporate powers, and therefore not to be void as in undue restraint of trade.

Contract — detective agency — implied warranty of secrecy. A novel question is passed upon in Easton v. Hitchcock [1912] 1 K. B. 535, where it is held that there is no implied warranty on the part of a person carrying on the business of a private inquiry agent, that the servants employed by him in it will not, after they have left his service, disclose to the client's prejudice information acquired by them in the service.

Criminal law — evidence — compulsion of wife of accused to give. That a statute providing that the wife or husband of a person charged with certain offenses "may be called as a witness either for the prosecution or defense, and without the consent of the person charged," does not so operate as to render one spouse compellable to give evidence against the other, is held in Leach v. Rex [1912] A. C. 305, the court expressing the opinion that the deep-seated principle of common law, that one spouse is not to be compelled to give evidence against the other, was not to be overturned by so ambiguous an enactment.

Damages for breach of contract — liquidated damages or penalty. A further contribution to the vexed question as to when a stipulated payment in respect of the breach of the contract should be regarded as liquidated damages, fixing once for all the sum to be paid, and when it is to be regarded as a penalty, covering the damages though not assessing them, is made in Webster v. Bosanquet [1912] A. C. 394, in which it is held that where it is impossible at the date of the contract to foresee the extent of the injury which might be occasioned by its breach, or the cost and difficulty of proving it, and the amount is reasonable, it should be recovered as liquidated damages.

Pledge — by executor — rights of pledgee. When an executor sells or pledges as executor, the purchaser or the pledgee cannot, except under special circumstances, of which lapse of time since the testator's death may be one, require him to answer as to the position of the estate of which he is executor, so as to show whether the sale or pledge is or is not justified by the circumstances; but where an executor has pledged as his own property personalty belonging to the estate, misapplying the proceeds to his own purposes, the pledgee, who had no notice that he was an executor and that the property pledged was the property of the estate, cannot assert title thereto as against the estate. Solomon v. Attenborough [1912] 1 Ch. 451.

Railroads — negligence — fence adjoining highway — duty to children crossing fence to play on railway property. The fact that children are, to the knowledge of the railway authorities, accustomed to

get through or over a fence separating the highway from the railroad's right of way, in order to play upon stacks of timber adjoining the fence, does not render the railway liable for injury to a child while straying upon the main line of the railway, between which and the timber there was a siding, where it was expressly found by the jury that the railway authorities did not know that children were in the habit of getting on the main line. Jenkins v. Great Western R. Co. [1912] 1 K. B. 525.

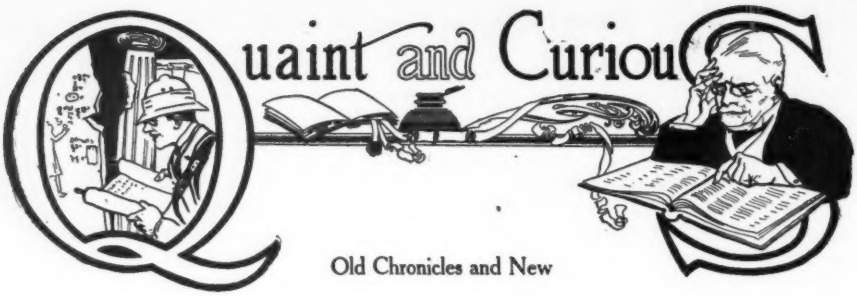
Receiver — shipment by — bill of lading giving lien — unsatisfied freight due from company. One who, as receiver of a company, directs the shipment of goods consigned to the company in the care of its agents, for which the carrier's agent makes out a bill of lading giving a lien not only for the freight payable for the particular shipment, but also for any unsatisfied freight due either from shipper or consignee, does not thereby subject the goods to a lien for unsatisfied freight due from the company, as in such case the receiver, and not the company, is both the shipper and consignee. Moss S. S. Co. v. Whinney [1912] A. C. 254.

Tradename — unfair competition — right to use of own name. An interesting aspect of the question as to the extent to which one may lawfully employ his own name in competition with another is involved in Kingston, M. & Co. v. Thomas Kingston & Co. [1912] 1 Ch. 575. There a person who had been employed by a company engaged in the catering business, in the corporate title of which his surname was used, on leaving the service of the company obtained the formation of a new company, in the title of which his name was employed, and of which he was managing director. It was held that although he, being under no contractual restraint, might lawfully carry on business as an individual in his own name, notwithstanding the use of it would be calculated to cause confusion between the said business and that of his former employers, and although having so carried on business and acquired a good will of his own, he might perhaps transfer to a new company as incidental to that good will the right to use his name as a part of their title, he was not entitled immediately on leaving his employment to transfer the right to make such use of his name to a new company, notwithstanding that the name carried with it the reputation of personal qualifications which he placed at the disposal of the new company.

Will — condition against litigation — when inapplicable or repugnant. A provision by a testator that in case any action or other proceedings for the administration of his estate should be commenced by any beneficiary as plaintiff, the costs of all parties should be retained and paid out of the plaintiff's share, was held in Re Williams [1912] 1 Ch. 399, not to apply to an action to enforce administration on the footing of wilful default; the statement being also made that if applicable to such an action the provision would be void for repugnancy to the gift.

Wills — construction — charitable bequest. A bequest to an archbishop and his successors, "to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in this diocese," is not a good charitable bequest, as it is not necessarily to be devoted to charitable uses. Dunne v. Byrne [1912] A. C. 407.

Will — gift to nonexisting person — latent ambiguity — admissibility of evidence. Where the person named as devisee in a will had, to testator's knowledge, been dead for seventeen years before the making of the will, extrinsic evidence is admissible to show that another person otherwise answering the description of the devisee and having a similar name was the devisee intended, as testator must be assumed to have contemplated some person whom he believed to be alive at the date of his will as the object of his bounty. Re Halston [1912] 1 Ch. 435.



Old Chronicles and New

Old Laws of Scotland. On the statute book of Scotland is still an act passed in 1825, ordering that "na man play futeball," because it is "esteemed to be unprofitable sport for the common gude of the realme and defense thereof." There is also a statute against alien immigration, passed in 1426, and authorizing "all his majesty's subjects" to "take, apprehend, imprison, and execute to death the said Egiptians (gypsies), either men or women."

A Question of Practice. An amusing incident occurred in the common pleas court a few days ago. The plaintiff claimed to have loaned some money to a man who had since died, and the action was to recover same. There was no memoranda whatever of the account. The complaint was drawn by an elderly gentleman of the bar who was admitted rather late in life. After relating every fact and circumstance of the case, both pertinent and impertinent, but principally the latter, the complaint finally wound up with the following language: "The plaintiff, after writing the deceased repeatedly concerning this debt and receiving no answers, finally went to the deceased in person and presented said account, which the deceased refused then and there to pay, and would not even acknowledge the justness of said account, and plaintiff was so shocked he didn't know what to do.

"Therefore plaintiff demands judgment, etc."

After the attorney for the defendant made a motion to strike out a great deal of impertinent stuff from the complaint, the counsel for the defendant insisted that the order directing it struck out also specify that "this order does not preclude the plaintiff from introducing evidence concerning the matters and things so struck out."

"Fixing" Justice. Justice, of course, is loudly demanded by a litigant in a court of law, but it is a frequent infirmity of the human mind to confuse justice with one's own cause. The late Thomas B. Reed used to tell an amusing story to illustrate this tendency.

He was once retained by an enterprising client to prosecute an action. On talking to the plaintiff's witnesses, Mr. Reed found that their stories were far from consistent, so he reported the fact to the client, and advised that the suit be dropped. The client was somewhat perturbed, but told the attorney he would have a talk with the witnesses and let him know next day what he had decided to do. True to his word, he dropped in bright and early, wearing the cheerful look of one who has won the good fight. "I've seen those witnesses," he explained, "and they say they must have been mistaken when they talked with you. They all see it alike now. I've also seen some of the jurymen, and they think I'll win. Now, if there is such a thing as justice in law, we can't lose."

Ex Parte. In a very recent case at a preliminary examination in the justice court in a California township, the defendant was charged with the crime of burglary, and the prosecution had a part of its testimony in and was waiting for another witness. The justice, in the meantime, reached into his desk, and got a legal blank and commenced writing. After the blank was nearly filled in, the attorney for the defense became curious, and stood up and looked to see what the

blank happened to be that the justice was filling in,—and it was a commitment. He suggested to the court that the taking of further testimony seemed unnecessary, and put in none on the part of the defendant, and the defendant was duly "bound over."

A Poetical Pleading. The following petition was recently filed in the district court at Sapulpa, Oklahoma. It was prepared by Attorney J. R. Miller, of the law firm of Hughes & Miller, of that city. The parties litigant are of African descent.

In the District Court, within and for Creek County, in the Twenty-second Judicial District, of the State of Oklahoma.

Ella Brown, Plaintiff,
vs. No. 2445
Henry Brown, Defendant.

Petition.

Most noble Judge, hear the plaintiff,
Ella Brown,
Who donning her best, has come up
town,
Not as of yore, on work is she bent,
But imploring justice, defendant won't
repent.
And these constitute her cause of action,
Enough? Yes to drive her to distraction.

First.

The plaintiff at the age of just nineteen,
Was as fair a damsel as ever was seen,
T'was then the defendant, dashing
Henry Brown,
Wooed and won her in old Muskogee
town.
On the twelfth day of November, nineteen hundred and four,
The gallant Henry, called at her mother's door.
He vowed his love for her should never
fail,
And he would tote in juicy possums by
the tail.
He would furnish her things to her
heart's content,
So long as he had a dollar, dime, or cent.
With such wonderful eloquence, Sir
Henry pled,
That Ella consented and straightway
they were wed.
Two years in Muskogee lived Mr. and
Mrs. Brown,
When they heard of Sapulpa, the magical town.
To the wonderful city they started by
rail,
But to them the train's pace seemed slow
as a snail.
The marvelous Sapulpa was reached at
last,
And six more years have faded into the
past.
In Creek county, Oklahoma, plaintiff has
lived more than a year,
The year next preceding, now do you
hear.
To this one time happy home of yore,
Came prattling children numbering
four.
Of these, three survive unto this good
day;
Namely, Venore, Jessie, and Ona May.
The first a girl of six, second a boy of
four,
Third a baby girl 'bout a year or little
more.

Second.

Plaintiff further states that during all
this time,
She has been a loving wife, keeping dutifully in line;
Not so with the defendant, Henry
Brown,
He has been a rounder in the good old
town.
Scattered his affections to the Oklahoma
breeze,
Staying out late at night, doing as he
please.
Broke the loving promises he eight years
ago did plight,
Then centered his affections on a girl
that isn't white,
She's dusky Georgia May ————, last
name unknown,
(I'm telling his short-comings in an undertone).
And just because he's guilty and I've
found he isn't true,
He says he'll kill me with his pistol
and kick me with his shoe.

This year, on unlucky Friday, April twenty-six,
He carried out his plan of beating me with sticks.
The big end of a buggy whip is what the villain used,
And from my head and arms, the blood did freely ooze.
From such inhumane treatment, I'd like to get relieved,
And this I'm entitled to, if my story is believed.
I'd like you to enjoin him and make him stay away,
And let me live at home with my babies day by day.
The household goods I'd like to have and alimony, if you please,
Better give the coin to me, he'll fling it to the breeze.
He's young and stout and able to work and hustle,
That's better than licking me, to exercise his muscle.
Lots 25 and 26, block two, westport addition to Sapulpa, I own,
(The deed was made to Henry), but I want it for my home.
Now don't forget my lawyers, they helped me out in this,
An attorney fee, *pendente lite*, I'm sure will not come in amiss.
Wherefore, Judge, to you, plaintiff prays for a decree,
That from the bonds of matrimony, will ever set her free;
Also the children, to feed and clothe and send to school,
She'll teach them good manners, and to observe the golden rule.
As from her fireside, defendant so frequently did roam,
She'd like to have the house and lots, to make her earthly home,
And the household goods in it she'll need,
And for these she will ever plead;
And to her lawyers, a hundred dollar fee, without subtraction,
Also, please charge up to Henry, the costs of this action.

Hughes & Miller,
Attorneys for Plaintiff.

A Quick Recovery. A Cleveland lawyer and a Cleveland railroad man went to a theater in that city. The railroad man saw a flashily dressed, red-faced, sporty-looking citizen sitting in one of the boxes.

This man was the no-account cousin of the attorney, but the railroad man didn't know it.

"Who is the tough person sitting in the box?" the railroad man asked pleasantly. "He looks like a drunken burglar."

"That," said the attorney, "is my cousin."

The railroad man gasped a couple of times, but soon got a grip on himself and remarked genially: "Well I went straight to headquarters for information, didn't I?"

A Daniel of Two Minds. A Kentucky blacksmith was elected justice of the peace. The first case he tried was litigation involving the ownership of a cow. The lawyers on both sides were young, ambitious, and eloquent.

The lawyer for the plaintiff spoke for half an hour in his best vein. When he sat down the new justice said:

"I've heard enough—plaintiff wins!"

The lawyer for the other side protested that he had something to say, too, and that it was unfair to render a judgment until both parties to the action had been heard.

"Go ahead and talk if you want," said his Honor, "but my mind's fully made up."

The young lawyer went ahead,—for an hour. He was a better orator even than his smiling and triumphant adversary. In his remarks on the cow he introduced, among other topics, the American eagle, the Southern cross, the bonny blue flag, and the old Kentucky home. When he sat down the new justice said:

"Well, now, don't that beat all? Defense wins!"—Detroit Free Press.

A Law Day at Pepperville. There was gloom over the court at this particular term—a way back, writes William Herndon, of Lancaster, Kentucky. Peg-Leg, the constable, was ruled "to show cause." He had had in his hands for collection an execution against Johnson, of Contraryville, the "meanest man up thar,"

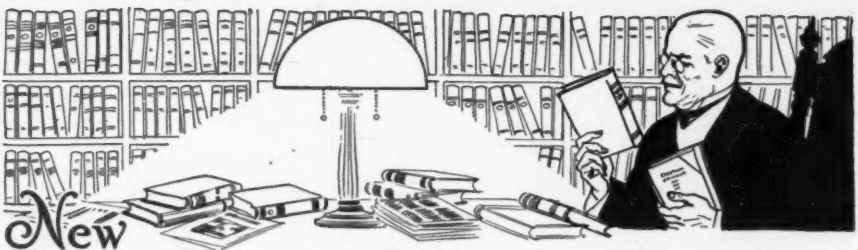
who had fed the officer with promises to pay, and thus postponed payment, until the execution was "dead in the constable's hands." Johnson and all Contraryville laughed at the officer, and Johnson told Peg-Leg to crack his whip. Collins, the great mischief maker, who kept things perpetually hot at his "store," which was used as a court room, had the constable in a state of extreme exasperation, so much so that Peg-Leg, in a blind fury, returned the writ indorsed, "Not made on account of d——m lize." After a little private conversation between Doolin, the constable's counsel, and the "squire," during which, "something passed" to the "squire," the latter said that Peg-Leg navin' paid into court the amount of the execution, with the bookin' and all the trimmin's, he had pacified the civil side of the law of the case; but that the colonel wanted the officer punished for contempt of court; and Doolin contended that there was no contempt, since the writ was handed to the squire in vacation, and not in open court, nor at any place, or in any way, to obstruct the administration of justice. The squire bridled up and gave Doolin to understand that his court was at all times an object of contempt; but that the law said that the truth could be always told in court, and that no man should be punished in his court for tellin' as straight a truth as Peg-Leg told when he writ that return. Then he said (with rising thermometer) "that Johnson would stay in jail until he settled the whole darned business with Peg-Leg," and court was adjourned *sine die* until next law day.

Novel Application of Principle of Assumption of Risk. In a recent case pending in one of the equity courts of Florida, wherein a lady (newly wedded) had sued her husband for maintenance and support, the chancellor, in passing upon the right of the wife's solicitor to fees for his services, applied an old legal principle in a new way, and, while it appears somewhat novel at a glance, upon mature consideration we think it well founded, and justly applied.

For convenience we digest the title to the syllabus as follows:

Married women without means—rights and duties of solicitors—risks assumed in event of reconciliation.

The lady, after leaving her husband, engaged the services of counsel, who immediately filed a bill for maintenance and support; the next day a master was appointed to take testimony as to the rights of the wife to maintenance and support, solicitors' fees, and suit money *pendente lite;* on the same day the master held a sitting, at which the wife's proofs were taken, and the next day a reconciliation was effected between the husband and wife, the wife returned to her husband's home, and phoned her lawyer to dismiss the suit. The case was exceedingly doubtful on the facts as to whether the wife was entitled to any relief, the law requiring that they should be living apart from each other "through the husband's fault," much less to counsel fees *pendente lite.* The lawyer in charge of the case not being willing to quit without a fee, and not willing to loose such a chance to compel the husband to pay his fees and costs, having received but a small retainer, reported the matter to the court by motion to be allowed fees and costs. The court after mature deliberation, having heard lengthy arguments as to the rights and wrongs of the transaction, held, *inter alia,* that a solicitor accepting employment of this character did so burdened with the knowledge of the "ways of life," and thereby assumed any and all risks incident to a reconciliation between the parties, and if such was effected *pendente lite,* his right to a fee was lost.



New Books and Recent Articles

"Workmen's Compensation and State Insurance Law." By Harry B. Bradbury. $6 net.

"New Jersey Corporation Law." By J. B. R. Smith. Buckram, $2.50.

"Digest of Decisions of Law and Practice in the Patent Office and the United States and State Courts in Patents, Trademarks, Copyrights, and Labels, 1897-1912." A Supplement to Hart's Digest, 1886-1897. By W. L. Pollard. 1 vol. Buckram, $6.50.

"Inheritance Taxation." By Peter V. Ross. Covers entire field of legacy, succession, and inheritance taxes in all the states; the decisions and statutes to date. With Forms. 1 vol. Buckram, $6.

"Digest of Decisions of the Utah Supreme Court." Covering volumes 1-36 Utah Reports. By Judson S. Rumsey. 1 vol. Buckram, $15.

Recent Articles of Interest to Lawyers

Admiralty.

"Some of the Legal Aspects of the Titanic Disaster."—53 Legal Adviser, 89.

Army.

"The Soldier's Faith."—19 Case and Comment, 84.

Attachment.

"Nonresidence as a Ground for Attachment.'—1 Bench and Bar, N. S., 64.

Attorneys.

"The Lawyer as a Citizen."—19 Case and Comment, 77.

"Civic Duties of the Lawyer."—19 Case and Comment, 80.

"The Duty of the Lawyer in the Conflict between the People and Leaders of Organized Wealth."—19 Case and Comment, 91.

"The Lawyer as a Patriot."—19 Case and Comment, 101.

"The Lawyer as a Factor in Social Progress"—19 Case and Comment, 105.

"The Lawyer in American History."—19 Case and Comment, 110.

"The Lawyer and Our National Evolution."—19 Case and Comment, 114.

"The Lawyer as a Business Man."—32 Canadian Law Times, 513.

"Settlements by Solicitors and Counsel."—48 Canada Law Journal, 361.

"The Solicitor's Lien."—32 Canadian Law Times, 499.

"History of the French Notarial System."—Annual Bulletin, Comparative Law Bureau, American Bar Asso., 15.

"The Notarial System in Italy."—Annual Bulletin, Comparative Law Bureau, American Bar Asso., 32.

"The Mexican Notarial System."—Annual Bulletin, Comparative Law Bureau, American Bar Asso., 42.

Aviation.

"Flying Men in Peace and in War."—The Outlook, June, 1912, p. 410.

Bills and Notes.

"The Negotiable Instruments Law."—29 Banking Law Journal, 497.

Civil Law.

"The Civil Law in America."—44 Chicago Legal News, 375.

"The Napoleonic Legislation."—Annual Bulletin, Comparative Law Bureau, American Bar Asso., 50.

Commissions.

"A Word about Commissions."—25 Harvard Law Review, 704.

Constitutional Law.

"Separation of Powers: Administrative Exercise of Legislative and Judicial Power."—27 Political Science Quarterly, 215.

"Unconstitutional Laws and the Federal Judicial Power."—60 University of Pennsylvania Law Review, 624.

"The Courts and Social Questions."—44 National Corporation Reporter, 653.

Contracts.

"Contracts Not to be Performed within One Year."—133 Law Times, 122.

Corporations.

"Limitations of the Statutory Power of Majority Stockholders to Dissolve a Corporation."—25 Harvard Law Review, 677.

Courts.

"The Judicial Function."—60 University of Pennsylvania Law Review, 601.

Criminal Law.

"The Suspended Sentence and Probation in

Theory and in Practice."—1 Bench and Bar, N.S., 58.

Eminent Domain.

"The Power of 'Compulsory Purchase' under the Law of England."—21 Yale Law Journal, 639.

Evidence.

"Written Evidence and Alterations."—25 Harvard Law Review, 691.

"The Profanation of Sacred Testimony."—19 Case and Comment, 119.

Government.

"A Draft of a Frame of Government."—27 Political Science Quarterly, 193.

Injunction.

"Injunctions and Labor Disputes."—The Outlook, June 1912, p. 375.

Master and Servant.

"The Legal Status of Workmen's Compensation."—24 Green Bag, 284.

Mexico.

"The Mexican Revolution: Its Causes and Consequences."—27 Political Science Quarterly, 281.

Monopoly.

"The New Competition."—The World's Work, July 1912, p. 317.

"How to Control Corners."—Business America, July 1912, p. 11.

Mortgage.

"Interests of a Mortgagee in Real Property under the Common and Civil Law.'—Annual Bulletin, Comparative Law Bureau, American Bar Asso., 63.

"The Lien or Equitable Theory of the Mortgage.—Some Generalizations."—10 Michigan Law Review, 587.

Patents.

"Restrictions on the Use of Patented Articles."—10 Michigan Law Review, 608.

Postal Savings Banks.

"The Director of 10,000."—The World's Work, July 1912, p. 300.

Proximate Cause.

"Master and Servant—Injuries—Proximate Cause."—44 National Corporation Reporter, 685.

Rates.

"Interest and Profits in Rate Regulation."—27 Political Science Quarterly, 239.

Recall.

"Judicial Recall."—21 Yale Law Journal, 659.

"The Recall of Judges."—21 Yale Law Journal, 655.

Shipping.

"Safety at Sea."—Century Magazine, July 1912, p. 461.

Towns.

"Model Towns in America."—Scribner's Magazine, July 1912, p. 20.

Trademarks.

"Letters as Trademarks."—32 Canadian Law Times, 509.

Uniform Legislation.

"What the Commissioners on Uniform Laws are Doing for the People of the United States."—75 Central Law Journal, 1.

"The 'Uniform Law' Movement—Its Progress and Prospects.'—75 Central Law Journal, 4.

"What the Conference of Commissions on Uniform State Laws Did Last Year—A Summary by the Secretary of the Conference."—75 Central Law Journal, 5.

"The Commission on Uniform State Laws—What It Is, What It has Done, and What It Needs."—75 Central Law Journal, 6.

"Shall There Be a Uniform Act on the Subject of Workmen's Compensation?"—75 Central Law Journal, 10.

Two Legal Lights

By Douglas Robbins of the Franklin (Ind.) Bar

—Old *Nunc pro Tunc* and *Quid pro Quo*—
They were launched in a friendly strife,
Each sent to float in a legal boat,
On the pettifog sea of life.
When the boat did start, old *Quid pro Quo*,
He hid in a hole on the dock,
While *Nunc pro Tunc* went to sleep in a bunk,
And forgot what it was o'clock.

And later on, when the boat had sailed,
Each one came a smiling by;
Said old *Quid pro Quo*: "What to do I know.
I'll 'stablish an *alibi*!"
Says *Nunc pro Tunc* with a wily grin:
"I can go you one better, I'll bet,
I will just pretend with a now for a then,
And I'll make that old voyage yet!"

Judges and Lawyers

A Record of Bench and Bar

Hon. Joseph B. Chrisman

A Fearless and Upright Judge

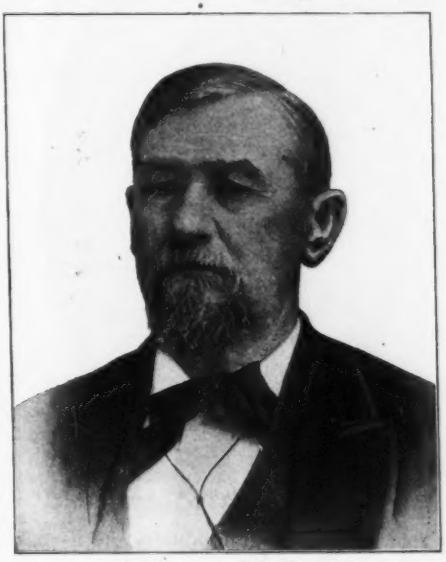
TWO notable instances of the unsurpassed courage of the subject of this sketch will be handed down from generation to generation in his state; the one, when by his eloquence, coupled with his universally acknowledged worth, he saved the life of a poor, helpless negro from an infuriated mob; the other, where he confronted a mob of "White-cappers," and preserved the dignity of the law.

The late Joseph Bledsoe Chrisman was born in Christian county, Kentucky, June 15, 1828. He was the eldest son of James Gholson Chrisman and his wife Clara Ann Bledsoe. His parents moved to Mississippi when he was about ten years of age. Educational advantages at that time were not good in the vicinity of their new home, in Smith county, and not being financially able to send their son away to school, they gladly availed themselves of the opportunity of putting the boy to work in the printing office of the Eastern Clarion, a noted newspaper of East Mississippi at that time, edited by Honorable S. R. Adams, at Paulding, Jasper county, and of which the Clarion Ledger of Jackson, the leading daily of Mississippi, is the direct successor. The boy too was ambitious, and made the very best use of his opportunities. He worked there faithfully for four years, then moved to Monticello, the county seat of Lawrence county, edited the county paper there for some years, when he was elected circuit clerk. This office he filled acceptably during two years, when he was elected to the legislature. Next he was elected to the state senate from Lawrence and Pike counties. Two years later the war between the states came on, and he volunteered in the first company from Lawrence county. Soon thereafter he was appointed, by President Jefferson Davis, Commissary General to the Trans-Mississippi Department.

At the close of the war he entered the practice of the law. His rule was not to take a case unless he believed it was just. Success came to him soon, and he secured as a partner an earnest and scholarly young lawyer, now the Honorable R. H. Thompson, of Jackson, Mississippi, whose admiration of, and love for, Mr. Chrisman increased with the years, and who recently said of him: "Judge Chrisman had a discriminating, judicial mind. He was an orator of great power alike on the hustings and at the bar; he possessed histrionic power to a high degree, was a man of splendid fancy, well regulated by sound judgment. As a judge he was upright, honest, and fearless, he had a strong sense of justice, strong common sense, and was free from prejudices. He had no political ambitions. On several occasions he declined to become a candidate for Congress when he could easily have been elected. Judge Chrisman was a great

advocate, and no man in the state ever acquired the powers that influence juries to a greater extent than he."

He was appointed circuit judge of his district in 1878 by Governor Stone, and held and adorned the position for sixteen years. He was elected a delegate to the Mississippi Constitutional Convention from Lincoln County in 1890, and took a leading part in its deliberations. Was a member of the convention while a judge, but contributed his entire pay as a member of the convention to the erection of a church in Jackson. Judge Chrisman was preeminently an apostle of civil righteousness; a distinguished and most successful worker in the great temperance movement which finally rid Mississippi of the open saloon. The foundation stone of these great traits and achievements was the Christian character of the man. The Bible was his chief study for many years. His Christian faith was the rock on which he builded his life.



HON. J. B. CHRISMAN

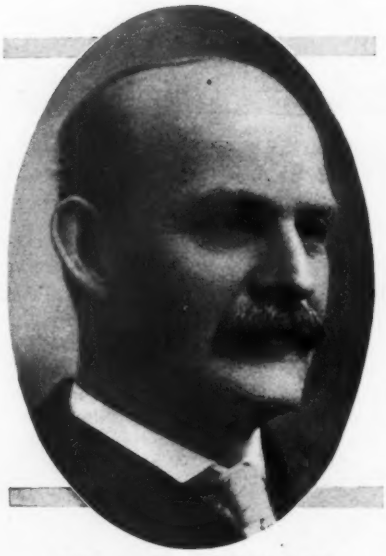
The "Whitecap" incident referred to has few parallels in the history of the jurisprudence of the country. Fortunately it has been preserved by Messrs. McWillie & Thompson in the dedication of their Digest of Mississippi Reports. Their tribute to Judge Chrisman, which follows, is deserving of a place among the classics of memorial eulogy.

"A great and patriotic exploit should never be allowed to sink into oblivion. It is a part of the common heritage of the people for whose sake it was performed, and, like the shield of a fallen hero, should be burnished and kept bright.

"Yielding to this sentiment, the authors of the present work must reverently dedicate it to the memory of the lamented Joseph B. Chrisman, who, on the 4th day of May, 1893, finding the courthouse in which he was presiding as a circuit judge of the state assailed by a large force of armed and defiant men seeking to rescue prisoners then in custody for trial before him, descended from the bench, called the law-abiding citizens to arms, and leading them in person at great peril to his life, put the invaders to ignominious flight. This memorable vindication of the honor and dignity of the state, whose commission he held, this splendid illustration of judicial dignity and civic virtue, is not surpassed by anything in the annals of Rome in her proudest day, and should serve both as an inspiration and a lesson for future generations. But superb as was his achievement, it has been in no way commemorated; no medal was ever struck in honor of it; no monumental bronze or marble perpetuates it; no vote of thanks even was ever tendered by the lawmaking department of the government. The fame of it lives alone in the recollection of persons who will soon pass away, leaving it to the uncertainty and obscurity of tradition. If this poor tribute shall, to any extent, aid in preserving so noble a feature of our judicial history, its authors will feel that they have greatly honored themselves and afforded a gratification to the bench and bar of the entire state. Mississippi has had many great judges, but it remained for Judge Chrisman to show, more than any other, the power of one man when personifying the majesty of the law and panoplied with courage and invincible determination."

A West Virginia Jurist

L. JUDSON Williams, in point of service the youngest member of the supreme court of appeals of West Virginia, was nevertheless the president of that high tribunal from January, 1911, to January, 1912. He was born near Williamsburg in Greenbrier County, West Virginia, on October 18th, 1856. His ancestors were of the sturdy Scotch-Irish people, who were the pioneers of Trans-Allegheny civilization in the southern part of West Virginia. He was educated in the public schools and private high schools of his native county, and in 1879-'80 was a student in the West Virginia University. He worked on a farm and taught public and private schools from 1876 to 1887.



HON. L. JUDSON WILLIAMS

In 1887, in obedience to an early formed ambition and long-cherished desire to become a lawyer, he moved with his family to Charlottsville, Virginia, and attended the Law School of the University of Virginia, and while there obtained his license to practise in that state. In 1888 he removed to Lewisburg, Greenbrier county, where he resided and practised his profession until his election in 1908 to the supreme bench. In 1899 Judge Williams was elected president of the West Virginia Bar Association, an honor of which he is justly proud. In 1901 he was appointed by Governor A. B. White a member of the West Virginia tax commission, and labored assiduously and faithfully in assisting in the preparation of a new system of tax laws. In 1903 he was appointed by Governor White a member of the board of regents of the West Virginia University, and in 1905 was reappointed by Governor Wm. M. O. Dawson, and rendered most efficient service as a member of said board until his election to the bench. Judge Williams is a strong lawyer, an able and conscientious judge, and being in the prime of life with a vigorous physical constitution, and long-trained habits of industry, he is making a fine record on the supreme bench of his state. His term of office as supreme judge expires on December 31, 1920.

Appointment of Boston Lawyer.

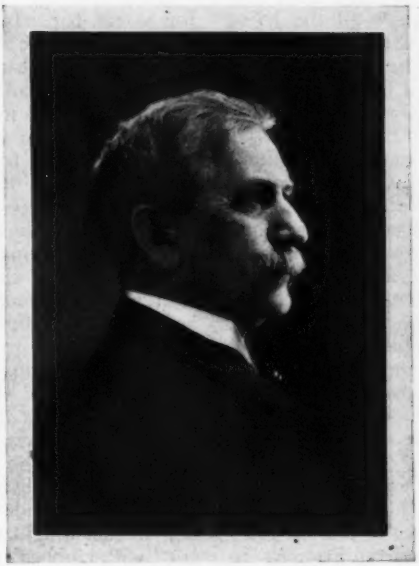
Honorable Josiah S. Dean, Associate Judge of the South Boston District Court, has been nominated by Governor Foss for license commissioner for the city of Boston.

Judge Dean is a son of the late Honorable Benjamin Dean, a former member of Congress. He studied law in the offices of his father and attended the Boston University and Harvard Law School, and was admitted to the bar in 1885. He was elected to the Boston common council in 1891 and 1892, and to the board of aldermen in 1897.

In 1893 Governor Russell appointed him special justice of the South Boston municipal court.

In a communication which appears on page 201 of this number, Judge Dean discusses an interesting legal question.

Hon. James L. Martin



HON. JAMES L. MARTIN

JAMES Loren Martin, United States district judge for the district of Vermont, was the fourth son of James and Lucy (Gray) Martin and was born in Landgrove, Vermont, September 13, 1846. He was brought up on a farm, and at the age of fourteen was presented with $20 and control of his time thence forward. He paid his expenses at school by working on farms by the month, doing piece work in chair factroies, laying wall by the rod, chopping wood and peeling bark by the cord, carrying on sugar lots "at the halves" and clearing land. His education in the public schools was supplemented by a course at South Londonderry Academy and Marlow, New Hampshire, Academy, in which latter institution he later became a teacher. He also taught in the public schools of Londonderry and Winhall for about six years.

In 1867 he became a law student of Judge H. H. Wheeler, and pursued his legal studies as time and opportunity permitted. The following year he went to Law School in Albany, New York, from which he graduated in May, 1869, and was admitted to the Bennington county bar the following month. He practised law in Londonderry from that time until January, 1882, when he moved to Brattleboro, where he continued the practice of law until he was appointed United States judge in October, 1906. He was appointed United States attorney by President McKinley in 1898, reappointed by President Roosevelt in 1902, and again in 1906, and was serving his third term when he was appointed United States judge. It will be observed that he studied law with Judge Wheeler, later was United States attorney for the district of Vermont, where Judge Wheeler was the presiding judge, and at Judge Wheeler's decease succeeded him on the bench. Judge Martin's political career began with his election to the legislature as representative from Londonderry in 1874, which town he represented for the next succeeding ten years, the last six years of which he was speaker of the house of representatives. In 1892 he represented Brattleboro in the legislature, declining to be a candidate for speaker, but served as chairman of the judiciary committee and second on the ways and means committee.

He was married November 19, 1869, to Delia E., daughter of Lewis and Mary (Aiken) Howard. She died December 14, 1881. Three children were born to them, none of whom survive.

On the 10th of January, 1884, he married Jessie Lilley, daughter of Captain Edward and Susan (Lilley) Dewey, of Montpelier. They have three children, Margaret S., Helen R., and Katharine G.

Judge Martin has presided at many important trials since his appointment as United States judge, among them being the sugar cases, so-called. In the winter of 1907, there came to light frauds by the sugar trust against the govern-

ment, on a scale bigger than any frauds on the revenue since the Whisky frauds of a generation ago.

The government first secured restitution of over $2,000,000, and then proceeded criminally against all the living participants in the crime, who reached from dock laborers, who worked the physical fraud, up to Charles R. Heike, the secretary and treasurer of the sugar trust.

The trial of these cases had national importance, and focused national attention upon Judge Martin. The cases involved complex issues which were hotly contested by able counsel, and the trials were of long duration. Convictions were secured against all defendants (except as to one, about whom the jury disagreed). But an even more strikingly important fact, in the history of important criminal prosecutions in this country, is that all the convictions in the cases presided over by Judge Martin were sustained on appeal.

In the trial of these cases, Judge Martin showed those qualities as a judge which are so well known to the bar practising before him,—ability, firmness in dealing with the questions that come before him, gentleness in dealing with men, and humanity in the imposition of sentence after conviction. Counsel for the defendant, as well as the appellate court, in speaking of cases tried before Judge Martin, unite in paying the fine tribute of saying they were tried with "his customary fairness."

These sugar prosecutions have resulted in the cleansing of the customs service, and have had a tremendous effect in improving the business morality of the community. The successful outcome of these cases in a very large measure is due to the very able and impartial way in which Judge Martin presided at the trial. In so doing he discharged a lasting public service.

Iron Brigade Commander.

General Edward S. Bragg, commander of the famous Iron brigade in the Civil War, died in Fond du Lac, Wisconsin, on June 20th. He had been in feeble health several years and was eighty-five years old last February.

General Bragg early won a high standing at the bar. In 1853 he was elected district attorney and at the expiration of the term refused a re-election. He was a faithful adherent of the Democratic party, and in 1860 was a delegate to the convention which nominated Stephen A. Douglas for the presidency. He represented his district in several national conventions at subsequent times, and it was while in attendance at the Democratic national convention of 1884 that one of his characteristic epigrams won him new renown and incidentally became a campaign slogan. It fell to General Bragg to make one of the speeches seconding the nomination of Grover Cleveland, during the progress of which he brought the big audience to its feet with the declaration, "We love him for the enemies he has made."

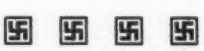
He had been distinguished in the Civil War as commander of the "Iron Brigade" which fought the "Stonewall" brigade" with clubbed muskets at the second Bull Run; he had served three terms in Congress and had been minister to Mexico and consul general to Havana and Hongkong.

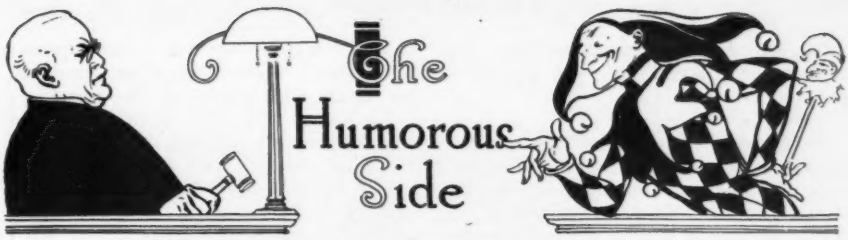
Death of Judge McNutt.

Cyrus F. McNutt, one of the best known members of the Los Angeles bar, died in that city on May 31st.

Judge McNutt was one of the attorneys for the defense of the McNamaras, and had been retained in the Darrow Case, but was obliged to withdraw on account of ill health.

Since coming to Los Angeles in 1897 Judge McNutt at all times took an active part in public affairs. He was born July 29, 1837, in Johnson county, Indiana. He was a graduate of Franklin College, Indiana, and was admitted to the bar at Indianapolis in 1860. Later he occupied a judicial position in his native state.





One ounce of joy surmounts of grief a span,
Because to laugh is proper to the man.—Rabelais

Willing to Compromise. Isaacs (who has been hit with a golf ball)—I vill have you in the law courts for dis. I vill sue you for five pounds damages!

Golfer—But surely you heard me shout "fore?"

Isaacs—Right! I vill take it!—London Opinion.

He Knew. A certain jurist was an enthusiastic golfer. Once he had occasion to interrogate, in a criminal suit, a boy witness from Bala.

"Now, my lad," he said, "are you acquainted with the nature and significance of an oath?"

The boy, raising his brows in surprise, answered:

"Of course I am, sir. Don't I caddy for you at the Country Club?"—Success Magazine.

An Interlude. An Irishman, a newly appointed crier in a county court of Australia, where there were a great many Chinese, was ordered by the judge to summon a witness to the stand.

"Call for Ah Song" was the judge's command.

Pat was puzzled for a moment. He glanced slyly at the judge, but found him as grave as an undertaker. Then turning to the spectators, he cried out in a loud voice:

"Gentlemen, would any of yez be good enough to give his Honor a song?"—Key-Notes—San Francisco.

Very Bad. Under the eye of Mrs. R. H. Barlow, the golf player, a Philadelphia lawyer teed off rather nervously and rather poorly at the Country Club.

"Do you know," he said to Mrs. Barlow, afterward, "it seems to me that the more I play the worse I play."

"You've played a good deal, then, haven't you?" said Mrs. Barlow.—New York Tribune.

No Novelty. In an upper corridor of a prominent hotel two colored maids were discussing the political situation. The younger seemed to have got the better of the argument until the subject of referendum was broached. Then it was that the elder, brandishing her broom, exclaimed in a tone of triumph:

"Y'all kain't tell me nuffin' 'bout de rougher endum, Miss Chloe, kase Ah done had the rougher endum all mah life!"—San Francisco Examiner.

Suspicious. "Did you notice any suspicious characters about the neighborhood?" the judge inquired.

"Shure, yer honor," replied the new policeman. "I saw but one man, and I asked him what he was doing there at that time o' night? Sez he, 'I have no business here just now, but I expect to open a jewelry store in the vicinity later on.' At that I says, 'I wish you success, sor.'"

"Yes," said the magistrate in a disgusted tone, "and he did open a jewelry store in the vicinity later on, and stole seventeen watches."

"Begorra, yer Honor," answered the policeman after a pause, "the man may have been a thafe, but he was no liar."—National Monthly.

Paving the Way. At a political meeting a very enthusiastic German made a speech beginning like this:

"My dear fellow citizens and fellow Shermans, I don't vant to say noddings about nobody, but look at dem Irish in de Tenth vard; vot have dey got? Paved streets! Und vot have we got? Mut! Mut! Now, my fellow citizens und fellow Shermans, vot I vish to say is dis:—

Coom, let us put our heads together und make a block pavement."—St. Paul Despatch.

Ambiguous. Alderman Puffer (at the council meeting, Puffington)—Gentlemen, we have been sending our lunatics to Dottyfield Asylum for a long time, and it has cost us a great deal of money; but I am glad to be able to make the statement that we have now built an asylum for ourselves." (Sensation in the council room.)

His Reputation. An aged man named Green, who had the reputation of being always ready to defend himself, was on trial for assault with intent to kill. The prosecution, in an attempt to impeach the accused, asked a witness:

"Are you acquainted with the reputation of Old Man Green for truth and veracity among his neighbors and acquaintances, in the vicinity where he lives, and among those who know him?"

"Yes, sir, I am."

"Is that reputation good or bad?"

"Well, sir, his reputation for truth is good, but his veracity is very bad."

This remarkable answer upset the gravity of the court and spectators.

Would Swap One of His Lawyers. Two Kansas City lawyers, whose names are withheld for obvious reasons, declare that they were present when the following incident occurred: One says it happened in Memphis, the other in Louisville. It really doesn't matter.

Uncle Mose was a chronic thief, who usually managed to keep within the petty larceny limit. One time he miscalculated, however, and was sent to trial on a charge of grand larceny.

"Have you a lawyer, Mose?" asked the court.

"No, sah."

"Well, to be perfectly fair, I'll appoint a couple. Mr. Jones and Mr. Brown will act as counsel."

"What's dat?"

"Act as your lawyers—consult with them and prepare to tell me whether you are guilty or not guilty."

"Yas, sah."

Mose talked to his attorneys for a few moments in husky whispers. The judge caught only the several times repeated word *alibi*. Then Mose arose, scratched his head, and addressed the court:

"Jedge, yoh Honah," he said. "C'ouse I'se only an ign'ant niggah, an' Ah don' want toh bothah yoh Honah, but Ah would suttinly like toh trade, yoh Honah, one ob dese yeah lawyers foh a witness."—Kansas City Journal.

They Were Even. John Mitchell, the labor leader, told this to the Pittsburg Dispatch:

"Harvey Barr, a successful lawyer, had a wonderful talent for getting the best of people. Even at home he kept his talent in play. His wife said to him one morning:

" 'Harvey dear, this is the fifteenth anniversary of our wedding. What are you going to give me?'

" 'This is what I am going to give you,' Harvey answered, affectionately, and he handed his wife $15 in crisp, fresh bills.

" 'Oh, thank you! And what shall I give you?' the gratified wife asked.

" 'That meerschaum pipe I've been admiring so long.' Harvey promptly announced.

"In the evening on his return home the pipe awaited him. It had cost just $15. He lit it up and began to color it carefully.

"But as the evening wore on his wife seemed ill at ease.

" 'Where is my present, Harvey?' she said at last, fretfully.

" 'Why, my dear,' Harvey explained, 'you gave me a pipe. I gave you $15. Don't you see? We're both even.' "

Quid pro Quo. "There," a self-satisfied "commercial" said, "that's what I think you should do in the matter. I'm not a lawyer, but this is a bit of advice that costs you nothing. What do you think of it?"

"Well," replied his companion, mildly, "it's worth it!"

Wary. The Prisoner—there goes my hat. Shall I run after it?

Policeman Casey—Phwat? Run away and never come back again? You stand here and Ill run after your hat.—Everybody's Magazine.